No. 11639

United States

Circuit Court of Appeals

For the Ninth Circuit.

HANSEN & ROWLAND, INC., a corporation,

Appellant,

vs.

C. F. LYTLE COMPANY, INC., a corporation, and GREEN CONSTRUCTION COMPANY, a corporation,

Appellees.

Transcript of Record

IN TWO VOLUMES

VOLUME II

Pages 467 to 579

Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division

Rotary Colorprint, 870 Brannan Street, San Francisco 6-26-47—60

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

ATTORNEYS OF RECORD

CHARLES T. PETERSON, Esq.

WENDELL W. DUNCAN, Esq.

JAMES L. CONLEY, Esq.

520 Perkins Building, Tacoma, Washington,

Attorneys for Plaintiff.

J. CHARLES DENNIS, Esq.

United States Attorney

HARRY SAGER, Esq.

Assistant United States Attorney

324 Federal Building, Tacoma, Washington,

Attorneys for Defendants.

In the District Court of the United States, for the Western District of Washington, Southern Division

No. 556

HANSEN & ROWLAND, Inc., a corporation,
Plaintiff,

vs.

C. F. LYTLE COMPANY, Inc., a corporation, and GREEN CONSTRUCTION COMPANY, a corporation,
Defendants.

ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause coming on regularly for further hearing pursuant to the decision and judgment rendered herein on October 31st, 1945, by the Circuit Court of Appeals of the United States, Ninth Circuit, Plaintiff appearing by Peterson & Duncan, its attorneys, Defendants appearing by J. Charles Dennis, Distric t Attorney for the Western District of Washington, by Harry Sager, Esq., Assistant United States Attorney, and additional evidence was taken on the issues necessary for the entry of a judgment for premiums due plaintiff, in conformity with the views expressed in the decision and judgment of said Circuit Court of Appeals, and the court being fully advised in the premises doth now make the following additional

FINDINGS OF FACT

In addition to Findings I to XII, both inclusive, made by the court and filed herein on September 22nd, 1944, which the court adopts, the court makes the following additional Findings of Fact and Conclusions of Law pursuant to said mandate of the Circuit Court of Appeals of the Ninth Circuit.

I.

That the part or portion of the payrolls representing wages or remuneration of workers traveling to Alaska, and in [1*] unloading and moving equipment to Gulkana, Alaska, in connection with, and for the purpose of performing work on Sections A1 and A2 being the 155 mile limits particularly described in the original contract, and with respect to which the insurance was made, which wages or remuneration was earned prior to the assignment of said workers to sections other than said sections A1 and A2, is the sum of $202,882.68. That all of said wages or remuneration was earned between the 17th day of June, 1942, the date that said insurance became effective, and August 31st, 1942, the effective date of cancellation of said policy of insurance;

II.

That between the 17th day of June, 1942 and the 31st day of August, 1942, the unit price contractors, Weldon Bros., and E. M. Deusenberg, Inc., performed work and labor, and together earned a total payroll of $90,053.81 on said sections A-1 and A-2 of said Alaska Highway. That said work so per-

* Page numbering appearing at foot of page of original certified Transcript of Record.

formed by said unit contractors Weldon Bros. and E. M. Deusenberg, Inc., was within the protection of the insurance and coverage referred to in paragraph IX of the original Findings of Fact and Conclusions of Law heretofore made by the court and filed herein;

III.

That between the 17th day of June, 1942, and the 31st day of August, 1942, workmen and employees of Defendants and the various unit contractors named in the insurance policy, Exhibit 4 herein, on which premiums are claimed, performed work and labor on a section of the highway known as Section A-3, between Gulkana and Slana, Alaska, for the purpose of, and necessary to enable workmen and equipment to reach said sections A-1 and A-2, and necessary for the transmission of supplies to said sections A-1 and A-2 of said highway, and without [2] which work and labor said sections could not be reached. That the remuneration earned by employees of plaintiff and of said unit contractors in the performance of said work was and is the sum of $27,594.00.

IV.

That by its terms said policy of insurance provided for cancellation by insured on a short-rate basis; that Defendants cancelled said policy of insurance by notice in writing effective September 1st, 1942;

V.

That the remuneration earned by the employees of Defendants and the employees of the unit contractors named in said policy of insurance between

the effective date of said policy of insurance, June 17th, 1942 and the effective date of cancellation thereof, Sept. 1st, 1942, was and is as follows: Travel time of employees and work in unloading and moving equipment directly connected with the performance of the contract on Sections A-1 and A-2 of said Alaska Highway, $202,882.68, which remuneration was earned by said employees prior to their assignments to other sections or areas; remuneration earned by employees of Defendants and said unit price contractors named in said policy of insurance between June 17, 1942 and August 31, 1942, necessary for the movement of equipment, employees and transmission of supplies to Sections A-1 and A-2 of said highway, $27,594.00; remuneration paid by Weldon Bros. and E. M. Deusenberg, Inc., to laborers employed directly on Sections A-1 and A-2 during the month of August, 1942, $90,053.81—total, $320,530.49. That based on the premium rate on account of earned payroll, or remuneration of the employees of Defendants and associate unit contractors in the performance of said work and activities, the earned premium computed in accordance with the customary short-rate table and [3] procedure was and is $4,904.10.

From the foregoing Findings of Fact the court now makes the following:

CONCLUSIONS OF LAW

I.

That plaintiff is entitled to have and recover judgment against defendants and each of them in the sum of $4,904.10, with costs.

Done in Open Court this 4th day of February, 1947.

CHARLES H. LEAVY,
United States District Judge.

Presented by:

CHARLES T. PETERSON
Of Counsel for Plaintiffs

(1) Plaintiff excepts to the refusal of the Court to compute the earned premium as respects the unit contractors by using as remuneration 50% of the entire payrolls of said unit contractors between June 17, 1942 and August 31, 1942.

(2) Plaintiff excepts to the refusal of the Court to allow interest from September 2, 1942 (the date of the cancellation of the insurance policy) on the amount found due from Defendants to Plaintiff.

The foregoing exceptions are hereby allowed.

CHARLES H. LEAVY
United States District Judge.

Defendants except to the foregoing Findings of Fact and Conclusions of Law, which exceptions are hereby allowed.

CHARLES H. LEAVY
United States District Judge.

Approved as to form:

CHARLES T. PETERSON,
Attorney for Plaintiff.
HARRY SAGER,
Attorney for Defendants.

[Endorsed]: Lodged Jan. 10, 1947.

[Endorsed] Filed Feb. 4, 1947.

In the District Court of the United States, for the Western District of Washington, Southern Division

No. 556

HANSEN & ROWLAND, Inc., a corporation,
Plaintiff,

vs.

C. F. LYTLE COMPANY, Inc., a corporation, and GREEN CONSTRUCTION COMPANY, a corporation,
Defendants.

JUDGMENT

This cause coming on for further hearing before the court on November 21st, 1946, and having been continued to the 26th day of December, 1946, plaintiff appearing by Peterson & Duncan, its attorneys; defendants appearing by J. Charles Dennis, United States District Attorney for the Western District of Washington, Southern Division, by Harry Sager, Esq., Assistant United States District Attorney, and additional evidence having been taken on the issues necessary for the entry of a final judgment herein in conformity with the views expressed in the decision and judgment and mandate of the United States Circuit Court of Appeals of the Ninth Circuit, and the court being fully advised in the premises, and having made additional Findings of Fact and Conclusions of Law herein, finding all and

singular additional facts pursuant to said decision, judgment and mandate of said Circuit Court of Appeals for the Ninth Circuit, wherein and whereby it found all and singular certain additional facts, and made its Conclusions of Law thereon, which additional Findings of Fact and Conclusions of Law are in writing, and on file herein, it is now, in accordance therewith, [5]

Ordered, Adjudged and Decreed, that Hansen & Rowland, Inc., a corporation, plaintiff herein, do have and recover of and from C. F. Lytle Company, a corporation, of the State of Iowa, and Green Construction Company, a corporation of the State of Iowa, and each of them, the principal sum of $4,904.10, together with costs in the sum of $94.00.

Dated: February 4th, 1947.

CHARLES H. LEAVY
United States District Judge.

Presented by:

CHARLES T. PETERSON,
Of Counsel for Plaintiff.

(1) Plaintiff excepts to the refusal of the Court to award judgment based on the earned premium as respects the unit contractors by using as remuneration 50% of the entire payrolls of said unit contractors between June 17, 1942 and August 31, 1942, as provided by the policy of insurance.

(2) Plaintiff excepts to the refusal of the Court to allow interest from September 2, 1942 (the date of the cancellation of the insurance policy) on the amount found due from Defendants to Plaintiff.

The foregoing exceptions are hereby allowed.

CHARLES H. LEAVY,
United States District Judge.

Defendants except to the foregoing Judgment, which exceptions are hereby allowed.

CHARLES H. LEAVY,
United States District Judge.

Approved as to Form:

CHARLES T. PETERSON,
Attorney for Plaintiff.

HARRY SAGER,
Attorney for Defendants.

[Endorsed]: Lodged Jan. 10, 1947.

[Endorsed]: Filed Feb. 4, 1947. [6]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The above-named defendants, C. F. Lytle Company, Inc., a corporation, and Green Construction Company, a corporation, and to J. Charles Dennis and Harry Sager, attorneys for defendants:

You and each of you will please take notice that Hansen & Rowland, Inc., a corporation, plaintiff above-named, hereby appeals to the Circuit Court of Appeals of the United States for the Ninth Circuit, from the final judgment of the Court entered

herein on the 4th day of February, 1947, and from each and every part thereof.

JAMES L. CONWAY,

PETERSON & DUNCAN,

Attorneys for Plaintiff.

Copy of the foregoing Notice of Appeal received this 23rd day of April, 1947.

/s/ J. CHARLES DENNIS,

/s/ HARRY SAGER,

Attorneys for Defendants.

Copy of the foregoing Notice of Appeal delivered to the United States Attorney at Tacoma, this 23rd day of April, 1947.

/s/ E. E. REDMAYNE,

Deputy Clerk.

[Endorsed]: Filed April 23, 1947. [7]

[Title of District Court and Cause.]

APPEAL BOND

Know All Men By These Presents:

That Hansen & Rowland, Inc., a corporation, as principal, and the Maryland Casualty Company, a corporation organized under the laws of the State of Maryland and authorized to do business in the State of Washington, as surety, are held and firmly

bound unto the C. F. Lytle Company, Inc., a corporation, and Green Construction Company, a corporation, in the sum of One Thousand and No/100 Dollars ($1,000.00) to be paid to the said C. F. Lytle Company, Inc., a corporation, and Green Construction Company, a corporation, or their assigns, to which payment well and truly to be made we bind ourselves, our successors or assigns, jointly and severally, by these presents;

Whereas, lately at a District Court of the United States for the Western District of Washington, Southern Division, in an action pending in said Court between Hansen & Rowland, Inc., a corporation, Plaintiff, and C. F. Lytle Company, Inc., a corporation, and Green Construction Company, a corporation, Defendants, a judgment was rendered in favor of the Plaintiffs, and against the said Defendants, and said Plaintiffs, having filed in this Court a Notice of Appeal to reverse said judgment and said action is now on appeal in the United States Circuit [8] Court of Appeals for the Ninth Circuit;

Now, Therefore, the condition of the above obligation is such that if the said Hansen & Rowland, Inc., a corporation, Appellant herein, shall prosecute its appeal to effect and satisfy the payment of costs if the Appeal is dismissed, or judgment affirmed, or such costs as the Appellant Court may award if the judgment is modified, then the above obligation to be void, otherwise to remain in full force and effect.

Dated: This 23rd day of April, 1947.

HANSEN & ROWLAND, INC.,
a Corporation,

By /s/ CHARLES T. PETERSON,

Its Attorney.

[Seal] MARYLAND CASUALTY
COMPANY, a Corporation,

By /s/ F. TUNNARD,

Its Attorney-in-Fact.

[Endorsed]: Filed April 23, 1947. [9]

United States Circuit Court of Appeals
For the Ninth Circuit

No. 11010

C. F. LYTLE COMPANY, INC., a Corporation, and GREEN CONSTRUCTION COMPANY, a Corporation,

Appellants,

vs.

HANSEN & ROWLAND, INC., a Corporation,

Appellee.

STIPULATION AS TO RECORD

Whereas, the United States Circuit Court of Appeals for the Ninth Circuit rendered its decision

in the above-entitled cause on October 31, 1945, by which decision the judgment of the lower court was in some respects reversed and the cause remanded to the District Court of the United States for the Western District of Washington, Southern Division, for further proceedings, and

Whereas, a further hearing in said cause was had pursuant to the said opinion and mandate of the United States Circuit Court of Appeals for the Ninth Circuit, and at the conclusion thereof a final judgment was rendered by said District Court of the United States for the Western District of Washington, Southern Division, on February 4, 1947, and Hansen & Rowland, Inc., a corporation, Appellee, in the above-entitled cause, feeling aggrieved at the decision and final judgment of the said District Court of the United States for the Western District of Washington, Southern Division, rendered on the 4th day of February, 1947, has served and filed a Notice of Appeal from said final judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and to the end that said Appeal may be presented and fully considered by the United States Circuit Court of Appeals for the Ninth Circuit, the parties [10] hereto hereby stipulate and agree that the matters and proceedings set forth in the printed Transcript of Record herein, together with certain of the Exhibits referred to therein, are material to a consideration of said Second appeal from said final judgment of said District Court of February 4, 1947, and to the end that said printed Transcript of Record heretofore filed in this cause

may be made a part of the record on said appeal, the parties hereto stipulate and agree that said Transcript of Record, including the Exhibits, made a part thereof and referred to therein, together with a copy of the further proceedings had before the said District Court, resulting in said judgment of February 4, 1947, together with Exhibits introduced therein, may, subject to the approval of this Court, be made a part of the record herein, it is further stipulated and agreed that the making of this stipulation does not foreclose either party hereto from designating portions and parts of the record of the further proceedings herein resulting in the final judgment of February 4, 1947.

Dated this 24th day of April, 1947.

PETERSON & DUNCAN,
JAMES L. CONLEY,

Attorneys for Appellant.

J. CHAS. DENNIS,
HARRY SAGER,

Attorneys for Appellee.

[Endorsed]: Filed U.S.D.C. April 28, 1947. [11]

[Title of Circuit Court of Appeals and Cause.]

ORDER

It appearing to the Court from the written stipulation of the attorneys of record for the parties hereto, that pursuant to the opinion and mandate of this Court rendered on the 31st day of October,

1945, a further hearing of this cause was had before the District Court of the United States for the Western District of Washington, Southern Division, and that said Court rendered a final judgment pursuant to said further hearing on February 4, 1947, and that Hansen & Rowland, Inc., a corporation, Appellees, above-named, has appealed from said final judgment to this Court, and the parties hereto having agreed that the printed Transcript of Record in this cause, together with the Exhibits set forth and referred to therein, and all proceedings incident thereto are material and proper to be considered on said appeal of Hansen & Rowland, Inc., a corporation, from the final judgment of the District Court of the United States for the Western District of Washington, Southern Division, entered herein on February 4, 1947, the Court doth now order that said printed record, together with exhibits described and referred to therein may be made a part of the record on said Second Appeal.

Dated April 25, 1947.

WILLIAM DENMAN,
United States Circuit Judge.

Presented in behalf of Peterson & Duncan, Attorneys for Hansen & Rowland, Inc.

WENDELL W. DUNCAN.

[Endorsed]: Filed U.S.D.C. April 28, 1947. [12]

In the District Court of the United States, for the Western District of Washington, Southern Division

No. 556

HANSEN & ROWLAND, INC., a Corporation, Plaintiff,

vs.

C. F. LYTLE COMPANY, INC., a Corporation, and GREEN CONSTRUCTION COMPANY, a Corporation, Defendants.

ORDER DIRECTING THAT ORIGINAL EXHIBITS BE TRANSMITTED WITH RECORD TO CIRCUIT COURT OF APPEALS

Upon application of Plaintiff, made in open Court, the Court does now order that Defendants' original Exhibits A-12, A-15 and A-16 may be transmitted by the Clerk of this Court to the Clerk of the Circuit Court of Appeals as part of the record herein.

Dated: April 23rd, 1947.

CHARLES H. LEAVY,
United States District Judge.

Presented by:

PETERSON & DUNCAN and
W. W. DUNCAN,
Counsel for Plaintiffs.

Approved: HARRY SAGER,
J. CHARLES DENNIS,
Attorneys for Defendants.

[Endorsed]: Filed April 23, 1947. [13]

[Title of District Court and Cause.]

PRAECIPE FOR RECORD

To the Clerk of the Above-Entitled Court:

Please prepare and certify, as a transcript on Appeal to the United States Circuit Court of Appeals, in the above-entitled cause, as follows:

1. Additional Findings of Fact and Conclusions of Law filed herein on February 4, 1947.
2. Judgment filed herein on February 4, 1947.
3. Notice of Appeal.
4. Bond on Appeal.
5. Stipulation of Parties Regarding Original Record.
6. Order of Circuit Court of Appeals re Original Record.
7. Statement of Points on which Appellant intends to rely on Appeal.
8. Order for Clerk to Transmit Original Exhibits to Circuit Court of Appeals.
9. Designation of Parts of Record to be printed (Appellants).

and transmit the same to the Clerk of the United States Circuit Court of Appeals, at San Francisco, California, together with transcript of testimony herein.

Dated this 28th day of April, 1947.

PETERSON & DUNCAN,
Attorneys for Appellant.

[Endorsed]: Filed April 28, 1947. [14]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing Transcript, consisting of pages numbered 1 to 14, inclusive, together with the original Reporter's Transcript of Proceedings, consisting of pages numbered 1 to 101, inclusive, original Statement of Points on Which Appellant Intends to Rely Upon Appeal, the original Appellant's Designation of Parts of the Record to be Printed in the Circuit Court of Appeals, and Defendants' original exhibits, numbered A-12, A-15 and A-16, comprise a full, true and correct record of so much of the papers, proceedings and records in Cause No. 556, Hansen & Rowland, Inc., a corporation, Plaintiff, vs. C. F. Lytle Company, Inc., a corporation, and Green Construction Company, a corporation, Defendants, as required by Plaintiff's Praecipe for Record on Appeal, on file and of record in my office at Tacoma, Washington, and the same constitutes the Record on Appeal from the Judgment of the District Court of the United States for the Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that I have this day transmitted to the Circuit Court of Appeals for the Ninth Circuit the original Reporter's Transcript of Pro-

ceedings, original Statement of Points upon which Appellant Intends to Rely, original Designation of Parts of the Record to be Printed and Defendants' original Exhibits, Nos. A-12, A-15 and A-16.

I do further certify that the following is a full, true and correct statement of all expenses, fees and charges earned by me in the preparation and certification of the aforesaid Record on Appeal, to-wit:

Appeal fee	$5.00
Clerk's fee for preparation of certified Transcript of Record on Appeal	1.40
	$6.40

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, in the city of Tacoma, in the Western District of Washington, this 26th day of May, 1947.

[Seal] MILLARD P. THOMAS,
Clerk.

By E. E. REDMAYNE,
Deputy.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Be It Remembered that on the 21st day of November, 1946, at the hour of 10:00 o'clock a.m., the above-entitled and numbered cause came on for trial before the Honorable Charles H. Leavy, one of the judges of the above-entitled Court, sitting in the

District Court of the United States at Tacoma, Pierce County, Washington; the plaintiff appearing by its attorney, Charles T. Peterson, and the defendants appearing by Harry Sager, Assistant United States Attorney; both sides having announced they were ready for trial.

Whereupon the following proceedings were had and testimony given, to-wit: [1*]

The Court: Docket 556, Hansen & Rowland, Inc., vs. C. F. Lytle Company, and others, for disposition of law matters raised by an opinion of the Circuit Court of Appeals.

The Court has read and reread this opinion in this case and from a study of it I come to the conclusion that the position taken by the trial court, in the case that these employees were not civil service employees to that degree or extent to which they would be exempt from liability that was sought to be covered by the insurance contract herein, the lower court was affirmed, and reversed from the finding made that all of these employees, even though they were assigned to other tasks than the construction of the hundred and fifty-five miles of highway covered by the insurance contract, were erroneously included in the payrolls that were subject to insurance premiums, and there is left in the case, then, only the question as stated in the language of the Appellate Court, whether or not the reason be the one suggested, the policy does limit coverage to a

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* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

specific area, the judgment of the District Court awarding full premium claim must be reversed.

An issue appears to be presented as to whether some part of the section of the payroll representing wages of workers traveling to Alaska prior to assignment comes within the premium base. That, it would seem to me, leaves [2] the situation one where it could almost be reached by agreement between the parties without the taking of any further testimony. However, if there be a dispute such as would require taking additional testimony to dispose of the issue that the Appellate Court has indicated, I am prepared to either now or at some future date to do that. But the evidence was quite complete, though I haven't had the benefit of the entire transcript of it, but at the time of the trial it is my recollection on that particular issue, with the one exception, and that is whether these employees who were recruited in the Middle West, and immediately went upon the payroll, were or were not all recruited to work on this particular section of highway mentioned by this contract—contract first between the contractors and the government and the coverage obtained by this insurance policy. The Appellate Court seems to leave the inference, at any rate, that the trial court in this re-hearing should determine as a matter of law whether the coverage dated from the recruitment of these employees. I have read a transcript of my oral decision, made at the time the case was disposed of, and therein I thought I made a finding that they would be so covered, and I think defendant's coun-

sel conceded that that should be the situation. I base this last statement upon a quotation [3] from a talk which had occurred between the Court and Mr. Sager, representing the defendant, in which it was said by you, Mr. Sager:

> "There are two contractors who worked there—only two during the period involved in the coverage."

That's on the one hundred and fifty-five mile stretch of highway.

> "In addition to that they are undoubtedly entitled to premiums on the payrolls involved while the men were coming up, because obviously they were coming up there in connection with this particular part of the highway, and they would come within the terms of that insurance policy."

I am inclined to again find that that was the situation, unless there be a contention that there was a recruitment of employees for some other section of highway.

Now with the statement that I have made, I will be glad to hear from the parties as to what your contentions are. I will hear from you, Mr. Sager, first.

Mr. Peterson: Mr. Polk, your Honor, was the resident engineer up there, and it may be possible with some short examination of Mr. Polk, that his testimony may be of assistance to us in arriving at the facts and particulars that are troubling me in the matter, and if it's agreeable, I would like to

have Mr. Polk take the stand and [4] interrogate him shortly.

The Court: Well, that may be done, but first I would like to have such comment from counsel representing the parties here as you feel warranted in making with reference to the statement that the Court has just made concerning this matter.

Mr. Sager: Well first, there is first one thing that I think probably your Honor has—I just want to call your Honor's attention to. You say it is your present inclination that the payroll of the men from the time of recruitment until they reached there, should be included. Now the policy—the insurance policy didn't go into effect until June 17th. Most of this recruitment occurred prior to that date, so of course any payroll of the men prior to the opening date of the policy couldn't be included. The policy coverage period was from June 17th to July 31st. Obviously no payroll beyond either of those dates, or outside of that period is attributable to premium.

The Court: Well, I am inclined to agree with you on that.

Mr. Sager: So the date of recruitment wouldn't be important. The date of travel of any of these men from—between June 17th and July 31st may be attributable to the premium base. Now beyond that—and I think at the time, [5] and apparently from what I said at the time of argument in the case, it was my impression then that they should be entitled to pay, or the pay should be included in the premium base while they were going up there, on the theory that—that the Sections A-1 and A-2

were the only ones involved. I think the facts which were not disclosed at that time alter that situation. The facts as I understand them are these, that before any substantial number of men got up into Alaska on this job, the government engineers—Mr. Polk, and some engineer, I think, or someone representing the Lytle & Green Company were there, and after looking over the situation, determined that the work should be done on these other sections of the highway than on the one hundred and fifty-five miles. This occurred probably before the 15th of June. They wired to the head of the Public Roads Administration in Washington asking for authority to divert the men to these other sections of the highway, rather than on the Sections A-1 and A-2, and got that authority approximately the 15th of June, on Section A-3. In about a week or ten days, or two weeks later, they got additional authority to divert the men to Section A-4.

Now its my position, your Honor, that since this was a contract—we're speaking now of the terms of the government's contract, not the insurance contract, but the government's contract, they had a right—the [6] government had a right to designate other portions of the roads in Alaska to be worked upon. If they did that between themselves—that is, the contractor and the government, and other sections were designated upon which the work was to be done, then it is our position that men traveling to Alaska from that time on were not traveling there to work on Sections A-1 and A-2, and that if they were not traveling on Sections A-1 and A-2,

irrespective of what the insurance people thought or knew—as a matter of fact they did not know anything about the contract—the details of it, that then the travel pay of these men is not in connection with the hundred and fifty-five mile work and should not be considered as part of the base for premium.

Now Mr. Polk can testify, I think, to substantially what I have said with respect to the change. Well, further than that, actually when the men did arrive in Alaska, and they arrived over a period of time, a lot of them not reaching there until along in July, but as they arrived they were assigned to other portions of the highway. All of them, even the two contractors who later went to work on sections A-1 and A-2, when they arrived there, were assigned to other parts of the road and did work on other parts of the road, and then subsequently were assigned to Sections A-1 and A-2, so that all of the men up there, under any of the contractors, [7] were assigned to other sections of the road as soon as they arrived.

Now, as I said, Mr. Polk will testify generally concerning those facts. He doesn't have any—he doesn't have the telegraphic authority received from Washington, either the copy that we received, or the copy that was retained in Washington, if one was retained, and he has to depend upon his recollection as to those dates and those facts. It may be we can get them later. We haven't been able to get them. While I learned of these facts about a week or ten days ago, and we haven't been able to get them returned.

Mr. Peterson: If the Court please, it's our contention that until such time as orders or instructions were given to perform service outside the limits of the hundred and fifty-five mile section, that all remuneration earned subsequent to the effective date of the policy, becomes a part of the base for the computation of premiums. For instance, I think it appears from the record that work was begun—actual work was begun on some of these sections on July 2nd, 1942. I have not been advised—I have had several conferences with Mr. Sager, and it is apparently difficult to get any information from the Public Roads Administration from what he tells me, and I have the same [8] difficulty trying to get any information from the defendants. I think it proper, however, to endeavor to narrow these issues just as much as they may be narrowed, so that it will save trouble for everybody, as well as the time of the Court.

In the decision of the Circuit Court of Appeals, the Court says the cause will be remanded for the taking of—or I'll go back:

"The judgment of the District Court awarding full payment must be reversed. An issue appears to be presented as to whether some part of that section of the payroll representing wages of the workers traveling to Alaska prior to assignment comes within the premium base. The cause will be remanded for the taking of such evidence on this or other issues." I call your Honor's attention to that "or other issues, as may be necessary for the

entry of a judgment for premiums due in conformity with the views herein expressed."

Now going back, your Honor, to page 6, does your Honor have a——

The Court: Yes, I have a clip sheet.

Mr. Peterson: Page 6, your Honor.

> "The change of plans adding to the blocking off of the A-1 and A-2 sections past the one hundred and fifty-five mile limit caused the principal personnel [9] recruited and the balance, as was testified by the government field engineer to be diverted from this job of construction to the A-4 highway section, farther north and inland toward Fairbanks. Only two of the fourteen associated union contractors with a total payroll of $90,053.81 of the total payroll of"—a million and so on—"on which the District Court based the policy premium worked on the A-1 and A-2 sections during the coverage period."

Now, are we to understand that that determination by the Circuit Court of Appeals is to be reopened in any way—the ninety thousand dollar matter?

The Court: Well, I think we are if that—if the calculation is in error there. If its some sum other than the ninety thousand dollars, we are.

Mr. Peterson: Now, the next paragraph, your Honor, I wish to direct your attention to particularly:

> "It was testified and not disputed that work

on Section A-4 was not directly a part of the A-1 or A-2 section work, and it plainly appears that it was not done in connection with the construction of the latter section as might have been the case if, for example, it had been done so that A-4 or A-4 might be used for necessary transmission of A-1 and A-2 supplies." [10]

Now, your Honor, the record shows that—the testimony of Mr. Clayton, that substantially everything was shipped to Valdez, about one hundred carloads of equipment and machinery. When Mr. Polk went on to the job he established his headquarters at Golkana and—will you hand me that map? Does your Honor have the printed record before you?

The Court: No, I don't have it here. The map was an exhibit.

Mr. Peterson: I will find it right here so your Honor will have an understanding of the situation. That is a photostatic reproduction, your Honor, of the exhibit which was introduced in evidence. Now the—all equipment and supplies were shipped, or substantially all, were shipped to Valdez.

Your Honor, I have indicated on the map before you in red pencil, Valdez and Golkana. Golkana is the postoffice indicated on the map, found in the record. Now it is my understanding, your Honor, that this equipment was taken in overland to Golkana, and then what has been referred to, I think in the record, as the Trail Road, was built on what is marked as the A-3 section there, the fifty miles, I

think it is, to Salana. Salana does not appear on the map that you have before you, your Honor, but it does appear in the printed record, and then a trail road was built in [11] from Salana, or from Golkana to Salana, where the work was begun, and that road was necessary, had to be built, to take in the machinery and equipment and supplies to Golkana to the one hundred and fifty-five mile limit, and thereafter all supplies, equipment, and employees were taken in to Golkana to the one hundred and fifty-five mile limit over the so-called A-3. I think the evidence will show a small airfield was established at Golkana, and all these employees were taken in—practically all of them—at least a great number, by plane, landed at Golkana and then transported over the so-called trail road to the one hundred and fifty-five mile limit.

Now, it is our contention under this language of the Circuit Court of Appeals, if, for example, it had been used, that is the section outside the one hundred and fifty-five mile limit, it might, as had been done, so that they could be used for the necessary transportation of the A-1 and A-2 supplies, then the remuneration incident to putting in that road so as to reach the one hundred and fifty-five mile limit, is properly included in the base for premium computation. We think that that necessarily follows the language of this opinion, and that therefore, in the further consideration of this case by your Honor, some evidence should be introduced with respect to that matter [12] and after that is done, and if your Honor concludes that our conten-

tion is proper in that respect, we will have the names of the contractors who worked on this so-called Trail Road to reach Salana, and that would strictly be a matter of computation from there on. I agree that this matter is largely one of computation, but that it will be necessary in this connection to have some evidence——

The Court: Mr. Peterson, it isn't your contention that any of the work done on Section 4 was done because it was essential to construct that first in order to reach that——

Mr. Peterson: My information, your Honor, so far is, that it was not, but my information very definitely is that Golkana was the convenient and feasible assembly point for men, material, and equipment, and it was necessary to construct this so-called Trail Road as it has been described to me, to reach Salana, and which is in the one hundred and fifty-five mile section. I doubt if anything on 4 had anything to do with sections 1 and 2, although I am not—I don't like to make a statement at this time regarding that.

The Court: Well, the paragraph of the opinion that you read refers to Section 4.

Mr. Peterson: Yes, it refers to section 4, but if your Honor will recall that when this case was tried before [13] your Honor, the pleadings were not finally recast until the afternon of the first day of the trial, and it seems to me that if the ninety thousand dollar item referred to by the Circuit Court of Appeals is to be opened up in this inquiry, that then by the same token the question as to

whether or not A-4 was actually used for the purpose of transmission of equipment and supplies may also be properly opened up, although as I understand the situation at this time, no such use was made of 4, and upon developing that and getting definite information on that matter—we are definitely advised it was not used, we would not pursue the question any further with respect to 4.

The Court: Well, you may proceed and make your record and further proof on this item that you mentioned.

Mr. Sager: Of course, your Honor, we do not think there is any question as far as the ninety thousand dollars is concerned. It seems to us the Court has decided that very clearly. The only thing left for further decision is this question of travel time on the way up to the job.

Now following the paragraph Mr. Peterson read—

The Court: I am familiar with it.

Mr. Sager: The Court says:

"Thus work done outside the specified sections of road was therefore not within the policy, and the general payrolls covering work done elsewhere cannot [14] properly be used as a part of the premium base."

It seems to me that clearly restricts, as far as the actual work on any part of these sections A-1 and 2. That matter had all been up before this Court and before the Circuit Court.

Mr. Peterson: I think that language is qualified by——

The Court: You may proceed with such evidence as you desire to offer.

Mr. Peterson: Now, your Honor, we haven't—we desire—my view and understanding of the matter is that we would have an understanding as to just what the issues would be, and then we would confine our evidence to those issues. We are not prepared to go through all this——

The Court: Mr. Peterson, I am satisfied from a reading and a rereading of this opinion of the Circuit Court, that the issue is, as stated in the opinion, as to what work was done upon the section of road that we have been referring to as A-1 and A-2, or the hundred and fifty-five miles, and not any work done upon any other section of the road, or any of the other contracts that the parties might have had with the government for the construction of roads. My recollection of the testimony was that the diversion grew out of the necessities of war, and when the original [15] contract was entered into between the government and the contractors, and likewise the contract of insurance entered into between the contractors and the insurance company, that they then contemplated continuous construction of the hundred and fifty-five miles of highway, but the war situation was such that they diverted part of those workmen, or nearly all of them to the other sections, referred to in the records, I think, as Sections 3 and 4.

Mr. Peterson: It seems to me the correct interpretation of this decision is that any work, outside of the hundred and fifty-five mile limit necessary

to be done for the transmission of A-1 and A-2 supplies and equipment is properly included in the premium base. It doesn't seem to me there is any escape from that, in view of the language of the Circuit Court of Appeals, on page 6.

The Court: I am unable to agree with you in that regard.

Mr. Peterson: However, we desire, your Honor, to make a record on it.

The Court: Yes, you may. Do you desire to do that now?

Mr. Peterson: No, your Honor. It will be necessary to take a deposition on that matter. And then from there on it will simply be a matter of computation. [16]

The Court: Well, I think I'll let you make your offer of proof, and I think if your offer is accepted, then the deposition would be in order. If it is denied, why you can just save your exception on that.

Mr. Peterson: Your Honor, right at the moment my information is not sufficient. I don't want to make—I wouldn't like to make an offer of proof, unless—without having all the information, in making an absolutely correct statements of the facts, which I intend to prove. I desire a further conference with Mr. Rice and Mr. Crowley, the manager up there. I could then submit the offer of proof in form of a writing, submitting a copy to Mr. Sager. I'm hardly prepared, your Honor, to make an offer of proof to the Court at this time and represent that its absolutely correct. I haven't sufficient information.

The Court: Well, do you have some testimony that you desire to put on now, either party? I would like to have you do so if you have a witness here who is familiar with phases of this contract—he may be called.

Mr. Sager: I want to put on some testimony, Your Honor, not in connection with this matter Mr. Peterson is talking about, but I suggest, Your Honor——

The Court: Very well. I take the position I do now because the Circuit Court in making a disposition of [17] this case, it appears to me, decided it independent of the inference that is drawn now from the paragraph that has been quoted, and that the language therein contained is not at all essential to a decision of the case.

Mr. Peterson: Will Your Honor leave the matter open so I may submit a written offer of proof?

The Court: Yes, I'll do that, but then I do not want this witness to have to be brought back here unnecessarily for a further hearing.

CLIFFORD G. POLK

produced as a witness on behalf of the Defendants, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Sager:

Q. Will you state your name?

A. Clifford G. Polk.

Q. And what's your present occupation?

(Testimony of Clifford G. Polk.)

A. I am a highway engineer in the Public Roads Administration.

Q. You testified with reference—at the previous trial in this case? A. Yes.

Q. What duties if any did you have in connection with the contract between the Government and Lytle & Green Construction Company?

A. Well I was the resident engineer for the Government on this contract.

Q. And did you go to Alaska in connection with that work? A. I did.

Q. When did you arrive in Alaska?

A. I think it was May 25th.

Q. Now at that time, who else was up there in connection with the contract? You say May 25th. That was for what year? [19]

A. 1942. I don't think there was anyone else there at that time. I believe I was the first one there in connection with that contract.

Q. Were there any Lytle & Green representatives there at that time?

A. Not on the job. Mr. Green, however, was in Alaska, but he also had other interests up there he was engaged upon primarily.

Q. Well, when did anybody else arrive there in connection with this work?

A. The first contingent arrived about June 18th, thirty to forty men. They flew in from—oh, I beg your pardon. I— they flew in but I don't know where from, whether it was from Edmonton or Seattle.

(Testimony of Clifford G. Polk.)

Q. Do you know what contractor they were employees of?

A. They were mostly a firm called the Western Engineering Company, a bridge firm—a bridge contractor.

Q. Is that one of these unit contractors?

A. Yes.

Q. When did the representatives of Lytle & Green—I mean someone in charge, arrive there?

A. Mr. Crowley the project manager arrived about June 21st or 22nd.

Q. Now when you got up in there, Mr. Polk, did you examine the territory and the roads that were to be worked on under [20] this contract?

A. Yes.

Q. And did you do anything as a result of that preliminary examination?

A. Yes, I immediately wired my immediate superior that it would be impossible to proceed with this one hundred and fifty-five mile construction primarily because the army had us bottlenecked—we couldn't get passed them. About two weeks later, about the 15th of June—maybe as late as the 18th of July, I received a reply——

Mr. Peterson: Now I object to this evidence as not being the best evidence. The reply is the best evidence—the telegram itself.

Q. Do you have that telegram?

A. No, I do not.

Q. Do you know what happened to it?

(Testimony of Clifford G. Polk.)

A. It's in our files somewhere, back in Washington, D. C.

Q. Have you made an effort to get it?

A. I have.

Q. What effort did you make to get it?

A. I caused a telegram to be sent to our Chief in Washington requesting the telegram. Apparently they couldn't find it because it wasn't sent.

Q. Did you get a reply from them?

A. We got a reply—we have a reply. [21]

Q. It didn't include the telegram?

A. It did not. It mentioned it.

Q. What authority did you have from your Chief?

A. I requested that work be done on Sections A-3 and A-4, rather than on——

Mr. Peterson: Now, just a minute. We object to that. The telegram is the best evidence, and he hasn't——

The Court: If the telegram isn't obtainable, Mr. Peterson, why I will allow secondary evidence.

Mr. Peterson: Your Honor, I submit he hasn't sufficiently accounted for not producing it.

The Court: The objection will be overruled, and an exception allowed. Proceed.

Q. Were you granted that authority?

A. We were first granted authority to work on Section A-3, as well as to improve the Richardson Highway, over which we had to bring our supplies.

The Court: Was the Richardson Highway A-4?

The Witness: No, it is not, Your Honor. It is

(Testimony of Clifford G. Polk.)

an existing road connecting Valdez to Gulkana, and on up to Fairbanks.

The Court: Oh, I see.

Q. Now, did you later get authority to work on A-4?

A. Later we received authority to work on A-*r*, yes, but not [22] on that first telegram. That was the second telegram.

Q. About when did you get these authorities?

A. The first one was sometime between June 15th and June 20th, and the second one was prior to July 1st of that same year, but later than the first one.

Mr. Peterson: Just a moment, I would like to interrogate the witness at this point.

Were those instructions in writing?

The Witness: They were in the nature of a telegram.

Mr. Peterson: Where are the telegrams?

The Witness: I beg your pardon.

Mr. Peterson: Where are the telegrams?

The Witness: As far as I know they are in our files in Washington. It's rather hard to explain, but when we left Alaska the files were all bundled up and shipped to Washington, D. C. I am referring to our own files on the local section in Alaska, and they are in Washington, but no one can find anything they want from those files, apparently.

Mr. Peterson: We object to this oral testimony, Your Honor. This has been our situation in this

(Testimony of Clifford G. Polk.)

case, there has been persistent requests for information regarding this matter, and we've always been sidetracked with excuses. I don't know the reason for it, and I am [23] not assigning any bad motive to anybody, but for some reason or another the disposition on the part of the defendant and the government here, is not to produce anything in writing, and——

The Court: But I understand Mr. Peterson, the witness says he made an effort to get these documents, but due to the method of handling documents, particularly under the stress of war, and the way in which they were sent back they have been unable to locate them, but that has has an independent recollection of them, and I think under such a statement of fact the secondary evidence is not only admissible, but is proper.

Mr. Peterson: We except—or we object on the grounds that no sufficient showing has been made for the admission of parol proof. The telegram is the best evidence.

The Court: Your objection will be noted and overruled. Proceed.

Q. Did you advise Crowley or—Crowley is the name of the man in charge of it?

A. Yes, sir.

Q. Did you advise him of what you were doing in connection with this?

A. Well, these telegrams to my chief were sent before Crowley arrived. The answers— the answer

(Testimony of Clifford G. Polk.)

to the first one was [24] received before Crowley arrived.

The Court: And who was Crowley?

The Witness: He was the project manager for the contractors——

The Court: I see.

The Witness: ——of Lytle & Green.

Q. And by the way, you say you wrote to your chief. Who was that? A. J. S. Bright.

Q. And his—what is his——

A. He was district engineer of the Alaska Highway for the Public Roads Administration.

Q. Now what, then, did you do after receiving these telegraphic authorities, Mr. Polk, in connection with the sections of the highway?

A. Well, we acted upon the authority given us in the telegrams.

Q. Now when did the men begin to arrive,—the actual men under these various contracts?

A. On or about July 1st. From then on.

Q. And as they arrived, were they assigned to work?

A. Yes, they were assigned to work, but, however, no actual construction of the road began until sometime later, because their equipment had not arrived.

Q. Well, what work did they do in the meantime? [25]

A. Erected—started to erect the main camp at Gulkana, and on June 7th they started some work on that section A-3, using just hand tools.

(Testimony of Clifford G. Polk.)

Q. On what date did you say?

A. That was June 7th—July 7, I beg your pardon.

Q. Well, were the men as they arrived assigned to particular portions of the highway, or to particular jobs?

A. The contractors were, yes.

Q. That's what I mean, and did they then work on those——

A. As soon as their equipment arrived, yes.

Q. Now, what—do you have any recollection of what work they were assigned to?

A. Well, I can give the assignment, I believe, of each individual contractor.

Mr. Peterson: Just a minute, may I ask were those assignments made in—by written order in accordance with the original contract?

The Witness: I believe not.

Mr. Peterson: They were not made in writing?

The Witness: Not at that time.

Mr. Peterson: Well——

The Witness: In accordance with the original contract—I don't understand that part of it.

Mr. Sager: I think that is cross-examination, any way. [26]

The Court: I am afraid it is, too.

Mr. Peterson: Well, it may be. I just wanted to know whether or not they were in writing. If they were in writing then the writing is the best evidence.

Q. Well, how did you designate or assign these

(Testimony of Clifford G. Polk.)

men to the various parts of the work up there, Mr. Polk?

A. Well, Lytle & Green were the management contractors and it was their duty to make all such assignments, with our approval, so, it was put up to them to make the assignments, and they worked out a—they worked out the assignments, which were entirely satisfactory to us.

Q. Well, what I am getting at is who actually directed the contractors to certain sections of the highway—certain——

A. Oh, well, as soon as—we were all waiting for those particular—that second telegram authorizing work on A-4, but as soon as those telegrams came in they were taken up with the management contractor, or his representative, and decided orally that we would go to work on those sections.

Q. On what sections?

A. Sections A-3 and A-4. Also this maintenance work on the Richardson Highway.

Q. Now, did any of the men go to work on Sections A-1 and A-2 upon their arrival?

A. No, they didn't, not on their arrival, no.

Q. Well, in the case on trial before, you testified that two of [27] them—two of the contractors were subsequently assigned to A-1 and A-2.

A. That is right, about August 1st of 1942, the two contractors, Dusenberg Brothers and Weldon Brothers were able to get on to that section, and they did.

Q. And where had they worked prior to that?

(Testimony of Clifford G. Polk.)

A. They—some of them worked at Valdez unloading equipment; some of them worked at Gulkana helping construct the rather large camp we had there; some of them worked on this maintenance work on the Richardson Highway, and some of them were working also on Section A-3.

Q. Now you are speaking of the two contractors?

A. I am speaking of both contractors?

Q. Was that generally true of the other contractors—the other unit contractors?

A. Well, generally. Some of them did not arrive until somewhat later and immediately they went to their assigned jobs, then, I think the contractor called Shothorn, for instance, arrived in Big Delta, Alaska, on about June 13th, and the very following day he started to work on Section A-4, which starts about ten miles from this airport of Big Delta, where they landed.

Mr. Sager: I think you may inquire. [28]

Cross-Examination

By Mr. Peterson:

Q. Mr. Polk, you set up your headquarters at Gulkana, is that correct—you set up your headquarters at Gulkana for this job?

A. My own headquarters was not at Gulkana, no.

Q. Well, where were your headquarters?

A. A little postoffice called Goltrana. Goltrana is the name of the place. It is only three or four miles away from Gulkana, and possibly five miles.

(Testimony of Clifford G. Polk.)

Q. And where was this equipment under the Lytle-Green contract assembled, in Alaska?

A. At Valdez.

Q. It was shipped to Valdez and unloaded from vessels there, then taken overland to Gulkana?

A. That is right.

Q. Yes, and that was the—was Gulkana on the Richardson Highway? A. Yes.

Q. On the Richardson Highway. Now, you have in mind, of course, these Sections A-1 and A-2 involved in the principal contract, have you not? You have those in mind? A. Yes.

Q. I think you made a sketch that was introduced in evidence. A. Yes. [29]

Q. Now, it was necessary, was it not, to—in order to reach Flannel—that is the end of the hundred and fifty-five mile limit, to construct that section of road over A-3, for the purpose of moving in equipment, and machinery and supplies—is that correct? A. No, sir.

Q. I beg your pardon?

A. No, sir, it is not correct.

Q. Well, why was the stuff assembled at Gulkana?

The Court: That was assembled at Valdez.

Mr. Peterson: No, I mean after it left Valdez.

A. Well, why was the stuff——

Q. Yes.

A. ——assembled at Gulkana?

Q. How did Weldon Brothers get their equip-

(Testimony of Clifford G. Polk.)

ment in on the hundred and fifty-five mile section?

A. They rode it in from Valdez.

Q. I beg your pardon?

A. They brought it over the road from Valdez to Salana.

Q. Well, all right. Did they use that—any of that Section A-3 to move their equipment over?

A. Yes, all of it.

Q. Yes, all of it. A. Yes. [30]

Q. They couldn't have gotten in these otherwise, could they? A. No.

Q. I mean——

A. They had to go over A-3. They had to go over the road to get to Salana, certainly.

Q. Yes, and that was true of the other contractor who went in on the hundred and fifty-five mile section. A. Yes.

Q. They had to use that Section A-3 road?

A. Yes.

Q. Yes. Now you had begun work on Section A-3, and you say on July 7th? A. Yes.

Q. What was the situation there with respect to timber and clearing, and matters of that kind? Was it a timbered area?

A. It is typical of all Alaska country. It is timbered—it is a heavy growth of very small timber.

Q. Small jackpine they call it?

A. Well, on that nature, but it is not jackpine.

Q. Yes, and that was true all the way from Gulkana to Salana, generally?

A. Except for the existing roads, yes.

(Testimony of Clifford G. Polk.)

The Court: I wish you would go ahead and tell me—I want to interrupt you, Mr. Peterson, I have to [31] in order to keep this clear in my own mind.

Was there a road already built?

The Witness: Yes, sir.

The Court: That is known as Section A-3 from Gulkana to Salana, over which equipment could be moved?

The Witness: Yes, sir.

Q. When was that road built?

A. That was built by the Alaska Road Commission, I think in 1938.

Q. In 1938? A. I believe so.

Q. And was it open to travel?

A. Yes, sir, there was considerable airport construction going on up in that area before we got there and all those supplies came in over that road.

Q. Where did that road extend to?

A. It extended to a place called Nebesna, about thirty to forty miles east of Salana.

Q. Was there a road right into Salana from Gulkana? A. Yes.

Q. How much of a place was Salana?

A. There was nothing there except one deserted roadhouse.

Q. Now there was a road from Gulkana to Valdez? A. Yes, sir.

Q. Now, isn't it a fact, Mr. Polk, that the first order to [32] do work on the section outside the hundred and fifty-five mile limit was dated July 7

(Testimony of Clifford G. Polk.)

—given July 7, 1942, and that was to begin work on Section A-3? A. No, sir.

Q. You say that is not correct?

A. That was—that was not the date of the telegram that I received that authorized this work on A-3.

Q. Now there was a trail road—a road called the trail. What road was that? Wasn't there a road out there into Gulkana known as the trial road?

A. No, I don't think so. The trial road is the term applied to that road that we built during the season of 1942.

Q. 1942, and where did that extend from?

A. From Salana to the International Border, and also from Big Delta Tanacross or Hope Junction.

Q. That run from Gulkana to Salana?

A. Well, as I say we refer to the trial road as that portion that we built which was from Salana to the Border, and also from Big Delta to that connection there near Tanacross. No, it is not the trail road, I don't think, that applies to that section from Gulkana to Salana.

Q. Well, shortly after Lytle Company got into Alaska, almost immediately after, weren't they ordered to assist in opening up the trial road, and that is within the hundred and fifty-five mile area, I understand? [33] A. Oh, yes.

Q. Yes.

A. We assigned two contractors to that.

(Testimony of Clifford G. Polk.)

Q. Only two? A. That is all.

Q. Was that trail road the site of the permanent road?

A. Yes, sir, it was never changed.

Q. And when were they assigned there, the trail road?

A. Well, they were assigned there I would say —I can't give a definite date, but it was shortly after July 1, 1942.

Q. Shortly after—did they go to work then?

A. They did not go to work because they had no equipment.

Q. Oh. When did their equipment finally come?

A. Roughly the middle of July, and it took another fifteen days to get it on the job. They went to work just as soon as they could get their equipment to the job.

Q. Yes.

A. Which was about August 1st.

Q. But they were originally assigned to that job? A. Yes.

Q. Yes, and until the equipment came they were filling in time around there some place?

A. Yes.

Q. On other stuff, is that correct? [34]

A. That's correct.

Q. And that's those two contractors you referred to. That's the two contracting firms you referred to, Weldon Brothers and the other?

A. Yes, sir.

Q. Yes. You are familiar with the original con-

(Testimony of Clifford G. Polk.)

tract, are you, Mr.—you are familiar with the original contract between the government and Lytle & Green?

A. Well, I was at one time, but I——

Q. Yes.

A. ——but I don't know whether I am right now.

Q. Do you recall that it contained a provision that the contract officer or his representative may at any time by written order, and without notice to sureties if any, make changes or additions to plans and specifications, issue additional instructions requiring additional work on Sections A-1 and A-2, and/or to work on other sections of the highway? Were you familiar with that provision?

A. Yes, sir.

Q. Did you make any written orders according to this contract?

A. We made a written order later.

Q. When?

A. I don't remember, but it was after the work started.

Q. Have you a copy of that?

A. It was after the work started. Pardon? [35]

Q. How long after the work started?

A. I would say that would be the latter part of August.

Q. That was simply confirming the oral orders theretofore given? A. Yes, sir.

Q. Now, will you produce that—can you produce a copy of that order? A. No, sir.

(Testimony of Clifford G. Polk.)

Q. Where is it, do you know?

A. All documents are in Washington, D. C.

Q. Have you made any effort to obtain that?

A. I did not make an effort to obtain that one, no.

Q. You don't have a copy of it in your files?

A. All my files are in Washington, D. C.

Q. In what department, if you please, do you know? A. Pardon?

Q. What department has control of those files in Washington, D. C.?

A. It is the Public Roads Administration.

Q. Mr. Bright still the head of that?

A. If anyone is at the head of it he is, but that isn't his present job. There is no such thing as the Alaska Highway District any longer. I don't know whether there are any employees.

The Court: Well, the Public Roads Administration [36] is headed by Mr. McDonald, isn't it?

The Witness: Yes, sir.

Q. Who prepared that written instrument confirming the previous oral orders? A. I did.

Q. You did. Did it refer to—your recollection now it referred to every oral order which was given?

A. Would you repeat that, please?

Q. Do you recollect whether it referred to every oral order which you gave with respect to changes and locations?

A. I think not. I do not think so. I think it was just the general authorization for them to proceed with construction on Sections A-3 and A-4.

(Testimony of Clifford G. Polk.)

Q. Did you keep any diary or any records when you gave these oral orders? A. Yes, sir.

Q. You did? A. Yes, sir.

Q. Where is that?

A. I do not know. It's in Washington, I presume.

Q. Oh, you—you didn't keep any record of it as far as that is concerned, which you now have?

A. No, sir.

Q. Do you know—you couldn't, I don't suppose, give us any estimate of time consumed in unloading this equipment [37] at Valdez, the equipment of these two contractors who worked on A-1 and A-2?

A. Well, I can say that the first boat load came in about June 18.

Q. About June 18.

A. And the—all the equipment was on the project about September 1st, but it did not all come in on that first boat.

Q. Well, I understand there was a large quantity of equipment. A. Yes.

Q. Do you know—I don't suppose you have any independent recollection when Weldon Brothers' equipment came in, do you?

A. No, I don't. Dusenberg's though, was one of the last to come in.

Q. And do you know when that was?

A. Their equipment—their equipment didn't arrive there until about the 1st of August in Veldez, or a little before that, probably.

(Testimony of Clifford G. Polk.)

Q. Now in your previous testimony in this case, I think you identified payrolls in connection with Dusenberg and Weldon's work, did you not? Do you recall that? A. Well, I think I did.

Q. Yes. [38] A. I don't remember.

Q. I wonder if those payrolls are in the record here. What I was interested in was to find out whether or not there was included in those payrolls the time of unloading equipment and material at Valdez.

A. I am pretty sure the payrolls included all their time from the time they were hired in Iowa, up through this August 31st date.

The Court: Now, is the time involved here to August 31st or August 1st?

Mr. Peterson: August 31st, your Honor.

Mr. Sager: August 31st.

The Court: From June 17th to August the 31st?

Mr. Sager: That is right.

Q. Were Weldon Brothers one of the first outfits to get in there?

A. Mr. Weldon himself was one of the first to arrive in there——

Q. Now when—when——

A. ——first of the contractors, but I do not recall whether his outfit was one of the first or not.

Q. About what time did he arrive, do you recall?

A. Mr. Weldon himself arrived about June 22, in company with Mr. Crowley.

Mr. Peterson: I would like to see that large [39] document there, bills. That's it. I wonder if we

(Testimony of Clifford G. Polk.)

can find those two payrolls which, as I recall, they were introduced in evidence of Weldon Brothers and Dusenberg.

The Court: Mr. Peterson, I am just wondering if you couldn't more expeditiously get at this thing and be able to make direct inquiry of the witness, for the purpose of the record—later. I mean by working with Mr. Sager and Mr. Polk?

Mr. Peterson: I think we can get along. I think that is a good suggestion, your Honor, I think that can be done.

The Court: And I could adjourn and give you an opportunity to do that. What I am interested in, of course, here is, under the direction of the Circuit Court, to ascetrain what men were recruited and brought up there subsequent to the 17th day of June, 1942, and were kept on the job, or worked on this job, or under this peculiar language here that has been cited to me, worked on branch roads that were essential roads in order to get in equipment, or worked in unloading and assembling equipment, so as to bring them within the coverage by the policy, and——

Mr. Peterson: I think——

The Court: ——and those rather comprehensive payrolls and other figures that do not touch upon that are [40] unnecessary, and I want to ask this question—I think I have asked it in one form or other, but I want to keep it so as to get it clear in my own mind, and that, first I would like you to explain what you mean by the army bottleneck that you referred to.

(Testimony of Clifford G. Polk.)

The Witness: Salana is at the confluence of two rivers, the Salana River and the Copper River. The Salana River in which we proposed to build our truck trail, is in a canyon—rather deep canyon and with precipitous side slopes.

The Court: Well now, was that the truck trail that was later designated as Section A-2?

The Witness: That would be—yes, sir, A-2, and the Army occupied that area by the time we got there with an entire regiment—some—I believe about twelve hundred soldiers, with lots of equipment, and there was nothing we could do. We couldn't get by them, and if we could get by them, there was no place to go. Well, it was impossible to get by them, that is all there was to it.

The Court: Well, was Section A-3 from Gulkana to Salana a sufficiently developed road that the assembled equipment at Valdez could be brought in to Salana?

The Witness: Yes, sir. I might add that other contractors—Morrison-Knutsen were shipping—oh, eight to ten truckloads a day over that road to Nebesna, from which they flew all their equipment to an airport called North Norclay. They were hauling over the road all the time. It was in the season of the year, though, when the road was soft. That was in May and June.

The Court: Well, was Section A-4, coming in from Fairbanks by the Big Delta Junction down to Tanacross Junction, a completed highway?

The Witness: No, sir, there was nothing but

(Testimony of Clifford G. Polk.)

virgin wilderness, the same as Section A-1 and A-2 —all virgin wilderness. Section A-3 had a road over it.

The Court: Was it essential to reach A-2 or A-1 for the purpose of transporting equipment and bringing in men to first construct A-4?

The Witness: I don't believe I understood that.

The Court: Could the contractors have proceeded with A-1 and A-2, without first working on A-4?

The Witness: Yes, they could go in by Salana.

The Court: Well, was it contemplated they come in the other way?

The Witness: No, no, that wasn't contemplated at all.

The Court: Well, then, why was it that part of these employees who were recruited for A-1 and A-2 [42] were shifted to A-4? Or were they?

The Witness: They were shifted to A-4 because —well, that's because of the war developments at that time. Fairbanks became a more important place than Anchorage, apparently.

The Court: But did that shifting have anything to do in the period that is here involved, from June 17th to August the 1st, with the construction work of A-1 and A-2?

The Witness: Well, frankly, I don't understand the question.

The Court: What I am trying to get at, Mr. Witness, is whether A-4 had to be built, either in

(Testimony of Clifford G. Polk.)

whole or in part, in order that you could proceed with the construction of A-1 and A-2?

The Witness: No, sir, it did not.

The Court: And your testimony is that Section A-3 was a passable highway over which assembled equipment could be brought in to commence work on A-1 and A-2?

The Witness: Yes, sir.

The Court: Now if that suggests questions to either of you later you can interrogate, but I wanted to get that clear, and then possibly make it easier for the parties to get at these payrolls as they touch upon these things. [43]

Now at Valdez, Alaska, when a shipload arrived, there were a substantial number of employees on the job, then?

The Witness: Yes, sir.

The Court: That belonged to these two contractors—subcontractors who would undertake the construction of A-1 and A-2?

The Witness: I do not know what contractors they belonged to, but there were plenty of contractors' men, although that first boat did arrive before very many contractors' men reached Alaska.

The Court: That's all that I have in mind. Let me ask you this: Was any of this assembled equipment moved from Valdez to any part of Sections A-1 and A-2 during the period here involved, from June 17th to August 1st, of '42?

The Witness: Not prior to August 1st.

(Testimony of Clifford G. Polk.)

Mr. Sager: Well, August 31st is the date, your Honor.

The Court: August 31st?

The Witness: Yes, sir.

The Court: And was that a substantial amount of it?

The Witness: I believe it was all the equipment of those two contractors, Weldon Brothers and [44] Dusenberg.

The Court: That involved the services of quite a number of men?

The Witness: Oh, yes.

The Court: I ask that so you can get that payroll.

Now, when these men were recruited, and this may be in the previous record, but I am not sure, I remember that they stated that they were recruited largely in the Middlewest and Iowa, and from Illinois and Nebraska and Texas—similar to that?

The Witness: Yes, sir.

The Court: And immediately upon their acceptance of employment they went on the payroll—or immediately upon—I had better correct that question. Immediately upon starting on their journey?

The Witness: Yes, sir, that is true.

The Court: They went on the payroll, and were they recruited for particular contractors or subcontractors?

The Witness: Yes, sir.

The Court: And then would your record show

(Testimony of Clifford G. Polk.)

which ones were recruited to work for these contractors who had A-1 and A-2?

The Witness: Yes, sir, the payroll records [45] show each contractor's employees.

The Court: In the light of these answers, I am going to suggest that counsel, when you are working over these files get the date of recruitment and the number of men that were involved under—or for these two contractors. I think that is all and I am going to let you try to work out some of those details. I don't want to have to try this case all over again, and this opinion of the Circuit Court doesn't call for that type of a determination, because, in many respects, the opinion of the lower court was affirmed.

Mr. Peterson: I would like to ask the witness another question.

Q. Was this so-called trail road readily passable between June and August, with trucks and equipment? A. Between what points?

Q. Between Gulkana and Salana?

A. No, it wasn't readily passable. The time of the year made it rather muddy.

Q. It was necessary to keep quite a large maintenance crew on that all the time, wasn't it?

A. Well, we did, because we did not have much else to do, but they were getting through without our help before we got there.

Q. Well, they were kept there just the same, that's true, [46] isn't it? A. That's right.

(Testimony of Clifford G. Polk.)

Q. And those were members of—employees of some of these different contractors on this job?

A. Yes.

Q. That is correct? A. Yes, sir.

Q. Do you remember—can you give us the names of some of those contractors?

A. That was engaged on that maintenance work?

Q. That were—yes.

A. No, sir, I cannot, but I can give you the names of the contractors engaged on reconstructing the road.

Q. Well, can you do that readily?

A. Yes, sir.

Q. But you can't give us the names of the contractors who were engaged in the maintenance of it?

A. Well, as you said a while ago it was just a mixture of a lot of them, a few men from every organization, I guess, for a while.

Q. About how many were kept there on the maintenance so it was kept passable?

A. Up to the time they went over to their assignments I would say there was somewhere between twenty and fifty.

Q. Between twenty and fifty, and then that was maintained [47] right along, as long as there was work carried on there, that's true, isn't it?

A. Yes, there was a small maintenance crew kept there all summer and all fall. Incidentally, later on it was under this contractor by the name of Lundeen.

(Testimony of Clifford G. Polk.)

Q. Lundeen? A. Yes.

The Court: But this twenty and fifty, were they all from the crews that were recruited for the purpose of working on A-1 and A-2?

The Witness: They were from any of the men that happened to be available, regardless of the contractors. That was just at the outset.

The Court: Do you have any way of segregating, as you are familiar with this case, which ones of them came from the two contractors who had this—these two sections of highway involved in this litigation?

The Witness: No, I have not.

Q. Is there any way, with your familiarity with the records, of segregating the employees, naming them by name, if possible, who worked on this maintenance proposition?

A. No, sir, there were very few of them compared to the twelve hundred that were up there. I haven't the slightest idea who it was.

Q. Well, I think you said fifty, or such a matter, something [48] like that?

A. I said from twenty to fifty.

Q. Twenty to fifty.

A. Was engaged, but that was before their equipment arrived, and they——

Q. I beg your pardon?

A. That was before their equipment arrived and they were scattered along the road.

Q. Well, was that road passable during the summer period without being well maintained?

(Testimony of Clifford G. Polk.)

A. It was very passable from about—from about the 15th of July on it was very passable.

Q. It didn't require any particular maintenance?

A. After Lundeen took over—took charge of the maintenance of that section he employed a crew of about twenty men, one or two motor patrol graders, and three or four trucks, and that is for the entire sixty miles.

Q. Well, I understand from the time they moved in there about June 17th or 18th until Weldon Brothers and Dusenberg had moved in, there was a substantial crew there maintaining the road.

A. A substantial crew maintained the road or otherwise engaged on it, just to keep them busy, mainly. It was quite readily accessible from their camp and they had no equipment. [49]

Mr. Peterson: Your Honor, under the policy of insurance it is made the duty of the insured to report the payrolls in connection with this matter for the purpose of the premium base and that's part of the contract on which we have sued here, and of course, under our contract we are entitled to have that done. They did, as Your Honor remembers, furnish us with the payrolls and the Circuit Court of Appeals held they were not to be considered, but now for the purpose of arriving at what we are entitled to I think we should have some effort at least of the defendants here, under their contract, to comply with their contract in that respect.

The Court: That's the reason if the parties are

(Testimony of Clifford G. Polk.)

advised of what the Court's position in the matter of law is going to be you ought to be able to work that out, and its very clear that this case can only be finally disposed of on the matter of dollars and cents, by some fair, reasonable and logical compromise, because there is no possibility of defintely ascertaining what the wages were of each of these various men who no one knows now, hardly, where they could be found or who they are, and——

Mr. Sager: If Your Honor please, we have the payrolls and I have a summary which I have submitted to [50] counsel——

The Court: Sure, but the payrolls have become so jumbled, insofar as the law has been announced here by the Circuit Court. If you pin yourself down to just work done on these two sections in this period of about sixty-five or seventy days, that would be a very simple matter, but unfortunately the Court has seen fit to inject another element into this case. This Court tried the case upon the basis of the payrolls submitted in accordance with the insurance contract. The Circuit Court now calls for a different determination, and it might be a question as to where the burden rests, but it seems to me that if you do not approach this with some spirit of compromise it is very evident to this Court now that more than the payroll of two contractors, who stood around there or sat around there, or what they did, on Sections one and two, for a period of sixty or seventy-five days, is involved in this case. It's more than that amount.

(Testimony of Clifford G. Polk.)

Mr. Sager: That may be so, Your Honor, but that is the purpose of this hearing. If your Honor will determine what part—give some basis or some formula. I don't think there is going to be any question on these payrolls. We've got them all here and got them all segregated, and I have submitted them to counsel. [51]

The Court: It would have been much simpler if the Circuit Court, in view of the position they have taken in this case would have determined the formula themselves.

I am inclined to hold, gentlemen, that this premium should be calculated upon all employees who were recruited to work on these two sections, from the time they went on the payroll subsequent or including June 17th, 1942, until the time they were diverted, if they were, after their arrival in Alaska, and of course the maximum outside limit would be August 31st; that these men who were recruited to work on these two sections should have not only their payroll time calculated while in transportation to work upon it, even though they were later diverted, but such men as worked in unloading, assembling equipment at Valdez, to be used on this job, and such men as worked in moving the equipment from Valdez to the—Salana or any other point along this 155 miles of highway; and likewise such men as were used from these crews to maintain the highway in the condition that equipment could expeditiously be moved along it on this part of the road known as Section A-3.

(Testimony of Clifford G. Polk.)

Now, from that outline if you can by an examination of the records or in any other way arrive at what that would be, then it would be fairly simple for the [52] Court to take your aggregate figures and arrive at a judgment.

Mr. Peterson: Well, Your Honor, there is another matter that maybe I haven't made it sufficiently clear. I can probably make it clear by reading a letter from Mr. Rice of the Lytle Company on the 13th in which he says that all of the initial organization for moving is on the work under the highway contract, was delegated, so to speak to Sections A-1 and A-2, which I believe are referred to as the 155 mile section named in the contract.

> "Shortly after getting into Alaska at the site of the work we were ordered to assist in opening up the trail road. Whether or not this trail road would come under the 155 mile section, I could not say. We don't find any record of being ordered out of the trail road or to my knowledge. Did, however, find a written memo order directing the contractors to work on Section A-3"—and that is the trail road, "which is outside the 155 mile limit, and this order bears the date of July 7, 1942."

Now, Your Honor, assume that this is the situation; that no order to work any other place was given until July 7th, and these men originally shipped up as Mr. Rice indicates was in connection with A-1 and A-2 all, not only these two contrac-

(Testimony of Clifford G. Polk.)

tors but all of them and [53] there has been no diversion until July 7th, then would we not be entitled to have the payrolls of that date on all employees used as a base for premium computation?

The Court: Yes, if that were an undisputed fact.

Mr. Peterson: I understand.

The Court: But this witness who was in charge, and whose testimony must be given great weight and consideration, unless it be discredited, states the contrary.

Mr. Peterson: Well, that's true, but I suppose to take the deposition of the witnesses who were on the job.

Mr. Sager: The only contention he is making there is that Mr. Rice is referring to some written order. Whether they gave him a written order or oral order isn't material here from the insurance standpoint. If they gave him an oral order and referred some places to that, the fact that the government contract says upon written order, does not put the insurance company in any better position, and apparently that is what Rice is talking about there, a written memorandum.

Mr. Peterson: The question of whether or not the men were recruited in Iowa and Nebraska for some unit outside of the 155 mile proposition is one thing, but if they were all recruited and all sent to Alaska under the [54] original contract for the 155 mile section, and then after they arrived at Gulkana, they were assigned to some different job

(Testimony of Clifford G. Polk.)

at that time, then I submit we are entitled to have the wages included up until the time when they were assigned to some other job.

The Court: I think that is true, limiting it however, to the effective date of this insurance contract.

Mr. Peterson: Yes, that's right.

The Court: The men that were recruited prior to that, even though they were recruited to work for these two contractors and who made the journey and who were on the payroll, would not be included.

Mr. Peterson: We are not making any such contention as that. We agreed that June 17th is the date from which we——

The Court: Well I don't see how your position is at all contrary to the position the Court's just taken now, excepting on the written orders not coming—not being issued until July 17th. I shall have to find that the diversion of the men, whenever it took place, within the life of this insurance contract, irrespective of the nature of the order in which it was made, would be the effective date. Now it seems to me that ought to give you some basis of calculation where you ought to be able to get together very nearly on this. [55]

Mr. Sager: I think we can, Your Honor, at least as far as the figures are concerned, I think we can determine the figures.

The Court: While this witness is present here and you have the benefit of his recollection and his ability to explain the documents that were offered

(Testimony of Clifford G. Polk.)

in the initial trial in this case, I feel that advantage should be taken of that situation, and then if there is some issue left in dispute that you want to take a deposition upon, or if there is something for the purpose of the record you want to make an offer of proof, you will be permitted to do that, of course.

Mr. Peterson: Mr. Polk, just before we leave this matter of assignment.

The Witness: Yes, sir.

Mr. Peterson: Do I understand that when these contractors came up there on the job, then they were assigned to some particular section?

The Witness: Yes, sir.

Mr. Peterson: Yes, and that was after arrival there?

The Witness: Yes, although some of these outfits didn't get in until very late.

The Court: I understand, but after they arrived there then you assigned them to a job? [56]

The Witness: Yes.

Q. (By Mr. Peterson) continuing: Now, I don't know whether you can advise us on this or not. Just as a matter of information, there is an Exhibit 10 here, which is a payroll in the amount of $309,000.00. Do you know whether or not you took that into account when you testified regarding the Dusenberg and Weldon disbursements?

A. Well, I don't know—I don't know what this payroll covers.

Q. Well, that is the payroll beginning about June 17 to July 15, inclusive, of 1942. Am I correct

(Testimony of Clifford G. Polk.)

in that? Anyway, it is to July 15th, 1942, I am very sure of that.

A. And the question again?

Q. I beg your pardon?

A. What was the original question?

Q. Do you know whether or not when you testified regarding the payrolls on Weldon and Dusenberg on this 155-mile section, you had the—you took the figures in that particular computation into account?

A. I can't definitely say, but I imagine that I did.

Q. Well, do you have any independent recollection of it?

A. Well, to me this looks like the original payroll of the entire Lytle & Green set up.

Q. No, you are in error in that, Mr.——that's only for the [57] first period, to July 15th.

Mr. Sager: But it covers all the contracts.

Mr. Peterson: It covers all the contracts.

A. Well, yes.

Mr. Peterson: So far as I know.

A. Yes, it does cover the Dusenberg and the Weldon for that period.

The Court: I think I shall adjourn court and continue a further hearing in this matter until—I could resume at 2:00 o'clock if you think you will have gotten anywhere, but I don't see how you can with so——

Mr. Peterson: I think it is impossible, Your Honor, without—I think we can probably take these

(Testimony of Clifford G. Polk.)

payrolls if the Court will make an order allowing us to withdraw the exhibit 10.

The Court: A minute entry may be made to the effect that—you mean withdraw it entirely?

Mr. Peterson: Withdrawing that for the purpose just of making the computation, Your Honor.

The Court: Yes.

Mr. Peterson: Oh, no, we don't wish to withdraw it. It's an essential part of the record, and I think we can agree, Your Honor, on how we will proceed on this accounting matter with Mr. Sager, and——

The Court: Yes. Well, I could take this up [58] at 2:00 o'clock tomorrow afternoon again and see what progress you have made. I can just continue the matter until then, and then if it is necessary to set it down for some other date I can do that. If you have made substantial progress in the matter as the court has outlined its position on the law, then if you have some offer of proof you desire to make I would like to have you have that in form to do so.

Mr. Peterson: Your Honor, it is impossible to have that in form without getting complete information from witnesses in Des Moines. I am satisfied I will have to take their depositions. I can't see any purpose in continuing this matter——

The Court: Of course you might all be surprised when you get together and go into conference on these figures and be so near together that you will conclude that the party who thinks they ought to have a little more and the party that think they

ought to have a little less, will make a Christmas present to the other, and make a disposition of it.

I have indicated to you pretty well, now, what my position is on the law as I construe this opinion from the Circuit Court. If that happy situation should arise that I have just indicated, why of course you can just announce it to the Court. If it doesn't I can [59] see where you probably will need some additional time and I think perhaps I better continue the case till December the 23rd.

Mr. Peterson: We will endeavor, if it is agreeable to the Court and counsel, to report to the Court. I have just consulted with Mr. Sager. I doubt if we will be able, Your Honor, to get these figures worked out short of a week or ten days.

The Court: Well, I am not trying to tie you to tomorrow afternoon. My thought in that suggestion was that there is a witness who is very material to both parties. He represents the Public Roads Administration of the United States Government, was on the job there, and I don't know what his assignments are, or what his duties are, and how soon he might be compelled to go elsewhere, and I don't want to hold him here any unreasonable period of time under order of the Court.

Mr. Peterson: Your Honor, I think we can do this. I think so far as Mr. Polk is concerned, I think Mr. Sager and myself will agree if there is any questions arise we can just write him and we will accept his written statement of it, if that will be satisfactory to the Court, without his coming

(Testimony of Clifford G. Polk.)

back and being under oath. We could stipulate—I would stipulate we could do that. [60]

The Court: Yes, my thought is you still shouldn't forego the presence and the use of him while he is here. Where is your office? Do you work out of the Seattle office?

The Witness: No, it is in Portland, and I can come up here any time but I have other commitments tomorrow. I would not like to be here tomorrow, but I can come any time.

The Court: Well you might see what you can accomplish today—the rest of the day, this afternoon on some of these matters involving these figures and this case will be continued on the record until December the 23rd. That's all.

Mr. Peterson: Now I wonder if the Court will make an order permitting the plaintiff to withdraw Exhibit number 10 for the purpose of calculation.

The Court: It will not require any written order, but the clerk will make a minute entry permitting the plaintiff to withdraw that exhibit for the reasons requested.

4:05 o'Clock P.M.

The Court: Now, you may proceed.

Mr. Sager: Since this morning's session, and in view of Your Honor's indication of what the proportion [61] of these payrolls should have been included in the premium base, I thought it advisable to put on some additional evidence regarding certain of those matters and I would like to call Mr. Polk

again to the stand. Before inquiring of Mr. Polk, however, we want to offer some additional exhibits. One is a certified copy of the payroll of the contractor Dusenberg. It was originally identified as Defendant's Exhibit A-11, but it was not admitted in evidence at the other hearing. That may carry the same number if it is satisfactory.

The Court: It will keep the same number. Do you have any objection, Mr. Peterson?

Mr. Peterson: No objection, Your Honor.

The Court: It will be admitted.

(Whereupon certified copy of payroll referred to was then received in evidence and marked Defendants' Exhibit A-11).

Mr. Sager: There is attached to that exhibit a pencil computation made by Mr. Polk at the prior hearing, which shows the total of the payroll—of that portion of the payroll, attributable to this policy period from June 17th to August 31. I think we have agreed that is the proper——

Mr. Peterson: We will agree that is correct.

Mr. Sager: That total is $102,380.24. That represents the entire payroll of Dusenberg contractor [62] during the period June 17 to August 31.

Now we offer also a certified copy of the payroll of Weldon Brothers which was previously identified as Defendants' Exhibit A-12. It likewise has a pencilled computation of the portion of that payroll attributable to the period June 17th to August 31, the total being $71,357.66.

The Court: Any objection to that document?

Mr. Peterson: We have no objection.

The Court: It will be admitted and bear the same marking that it did when the case was first heard.

Mr. Peterson: I have no objection to the exhibit and we agree that the computation is correct, Your Honor.

(Whereupon payroll referred to was received in evidence and marked Defendant's Exhibit A-12.)

The Court: Very well.

Mr. Sager: We will offer Defendants' Exhibit A-15. It is a computation of the payroll of all of the other contractors, other than Dusenberg and Weldon Brothers, during the period from June 17th to the arrival and—of the men of those contractors in Alaska on the job and their diversion to other work than Sections A-1 and A-2. It has an adding machine tape attached to it showing the total of that computation for the entire [63] number of men, and the total of that is $137,932.80. We have agreed that that is an accurate computation.

Mr. Peterson: Yes, we agree to that.

The Court: It will be admitted in evidence.

(Whereupon payrolls referred to were received in evidence and marked Defendants' Exhibit A-15.)

CLIFFORD G. POLK

recalled as a witness on behalf of the Defendants, was examined further and testified as follows:

Direct Examination

By Mr. Sager:

Q. Now, Mr. Polk, you testified this morning that there were some work on the part of all of these various contractors in unloading and transporting their equipment from Valdez into the job.

A. Yes.

Q. Would there be any means of determining the actual and accurate payroll of those men upon that type of work?

A. No, there is no way that you can determine it mathematically correct.

Q. Have you given consideration to the matter and arrived at an estimated figure of what that payroll would be? A. Yes. [64]

Q. What was that figure? A. $35,000.

Q. And that would be for all the men of all the contractors, exclusive of Weldon Brothers and Dusenberg? A. Yes.

Q. And that figure would cover both the unloading and the transportation—— A. Yes.

Q. ——to the job. Now likewise you testified this morning that some of the men were used upon Section A-3 in maintaining that section of the highway. Would there be any way of determining accurately the number of men or the payroll attributable to them while engaged in that maintenance work? A. No, there wouldn't.

Q. And have you given consideration to an esti-

(Testimony of Clifford G. Polk.)

mate of that figure for the period covered by the policy? A. Yes, I have.

Q. What is that figure?

A. In dollars it amounts to twenty-two thousand, five hundred and ninety-four.

Q. And are those estimates in your judgment a fair estimate of the total of the amount of money expended in payroll for those two—or for that work?

A. Yes, and that does not include the Dusenberg nor Weldon. [65]

Q. The maintenance figure you gave. It excludes those? A. It excludes those, yes.

Mr. Peterson: I understand, Mr. Sager, the computation—did you state that it was furnished you by the Attorney General's office, the computation? I just wanted to show the source, is all.

Mr. Sager: It came to me from the Attorney General's office, but it was computed in the office of the Public Roads Administration.

The Court: Well, now are these figures of $35,000 for Valdez and $25,594 for work on Section 3,—maintenance section? You say exclusive of the employes of the two contractors who had the subcontract on Sections 1 and 2?

The Witness: Yes, sir.

Mr. Sager: The reason for that being, Your Honor, in the two exhibits we show their entire payroll.

The Court: Oh, I see, and then it would become a matter of calculating the deductions, is that it?

(Testimony of Clifford G. Polk.)

Mr. Sager: Well, we don't want to duplicate their payroll twice. Your Honor indicated this morning, you—at least I interpreted that you thought the entire payroll of those two contractors who went to work on Sections A-1 and A-2 would be attributable to the premium base. [66]

The Court: That's right.

Mr. Sager: So we show that by these two exhibits—these two payrolls, their entire payroll. Now some of those men worked in unloading equipment and hauling it in and also worked on this maintenance, so they, in his estimates of the amount of payroll attributable to these two functions, we have excluded—he has excluded any of the Dusenberg and Weldon Brothers men, because their entire payroll——

The Court: What I am interested in is what was the Dusenberg and the Weldon payroll—what was that payroll in connection with the unloading and in connection with the maintenance? Can that be arrived at from these exhibits, and these calculations?

Mr. Sager: No, it can't.

The Court: That's the question we have for determination.

Mr. Sager: Well, if you include their entire payroll during the period that the policy covered, you wouldn't be interested in whether it's one phase of the work or another, and it was my thought that that was your Honor's indication this morning that their entire payroll should be included.

(Testimony of Clifford G. Polk.)

The Court: No, that doesn't seem to me to answer the problem that I feel that I have for decision, [67] because it's contended and it's admitted that a part of their entire payroll during this time was on diverted work, during the period from June 17th to August 31st, inclusive.

Mr. Sager: That is right.

The Court: And so it doesn't help—this situation doesn't help in the solution.

Mr. Sager: Well, then I misjudged your statement this morning, because I took it that——

The Court: No, if it was merely the simple matter of adding or subtracting here with figures that the witness testifies to, we have a different situation. What I wanted to get at was how much of the Dusenberg and Weldon payroll was given to unloading equipment and all of the necessary preparatory steps to moving it in to the job, which would be chargeable as a part of the contract Sections 1 and 2, and how much of their payroll during that period would be taken on the repair and maintenance of the highway so the equipment could be moved in to the place where it was to have been used, though by reason of later diversion orders it was not moved there.

Mr. Sager: In other words then, as I understand it now, your Honor made no distinction between Weldon Brothers and Dusenberg and any of the other contractors. [68] In other words, their time in transportation in there and their time in unloading and transporting equipment and main-

(Testimony of Clifford G. Polk.)

tenance would be a part of the premium base, but work done elsewhere would not be.

The Court: That is correct, but not the employees of the other contractors.

Mr. Sager: Well, of course none of the other contractors ever worked on any of these two sections during the policy period.

The Court: No, but they commingled their men, as I understand it, with the men that were working on the maintenance work on Section 3 that went from Valdez into the point where this work was to begin. There were men there from all contractors you testified this morning, Mr.——

The Witness: That is true up until they started to work on their assignments. That is true from the time they arrived in Alaska to the 1st of August when they started on their assignment on Section A-2.

The Court: The 1st of August?

The Witness: Yes, that is the date that has been set that they started their assignment, I believe.

Q. That is Weldon Brothers and Dusenberg?

A. Weldon Brothers and Dusenberg.

Q. That is the time they started to work on Sections A-1 [69] and A-2? A. Yes.

Q. Well, these estimates——

The Court: Let me ask you if you have any proof at all in this record, either this subsequent record you are making now or in the prior trial, as to the time of the work in Sections A-1 and A-2,

(Testimony of Clifford G. Polk.)

during the period covered by this contract of insurance?

Mr. Sager: That is clear in the first hearing. That is the figure used by the Circuit Court——

The Court: Very well, that is not an issue.

Mr. Sager: August 1 to August 30, the only time that anybody worked on A-1 and A-2, actually.

The Court: Then we have from June 17th to August 1st, the work and the travel time for which these Weldon Brothers and Dusenberg employees were employed on the maintenance of the road and the loading and other incidental work in connection with the equipment at Valdez, or unloading.

Mr. Sager: That is not in the record without additional proof here, although I think we can readily get it.

The Court: What I tried to say this forenoon and perhaps I did not say it as clearly as I should, under this decision of the Circuit Court I feel that I [70] am impelled to find that the insurance rates should be calculated upon all employees, or their wage that they received in working on the two sections—that's 1 and 2, during the period here involved, and in addition thereto, there should be included, insofar as it can be ascertained, the time these same employees, or employees of these same contractors put into unloading the equipment and supplies that were to be used on this contract, plus the time that they put into maintaining the highway on Section 3, so that it was available for the movement of this heavy equipment, plus any travel time within that period covered by the contract.

(Testimony of Clifford G. Polk.)

Mr. Peterson: I think I misunderstood your Honor on that matter. I understood the ruling of the Court to be with respect to travel time that travel time applied to all contractors, or labor performed by employees of all contractors, until such time as a diversion was directed.

The Court: There has never been any contention in this case that the insurance premium should be calculated upon the employees other than those that were engaged by these two contractors on these two sections, and such things as are incidental to that work.

Mr. Peterson: Well, now, your Honor, it has been our contention all the time and is now, that for the purpose of the premium base, all work performed under the original contract up until such time as a diversion was directed, should be considered in computing the premium base because it was done under the principal contract for the 155-mile section.

The Court: Well, the 155-mile section is just those two sections that are designated in this record as Section 1 and Section 2-A.

Mr. Peterson: Until a diversion was directed, your Honor. All employment was done under the principal contract. After a diversion was directed then obviously it presented a different situation. Assume there hadn't been any diversion at all, and this work had gone on to completion, there wouldn't be any question about it, but after the contract was

(Testimony of Clifford G. Polk.)

made and before any diversion was ordered, all contractors were—had employees who were operating obviously under the original contract in going to work, for instance. Now, if after they got up there they were diverted to some other section, then of course under the decision of the Circuit Court of Appeals, after that diversion, their wages did not become subject to computation or included in the base, but until such time as there was a diversion, they were operating under the original contract. [72]

The Court: Well, I think your error occurs in this, Mr. Peterson, that you would calculate all the recruited employees of these two sections of highway when in fact they were recruited for at least five sections of highway and under at least five separate subcontracts.

Mr. Peterson: I think your Honor is assuming something that's not in the record. There wasn't any diversion order until after this contract was made and until after these men—I understand, according to Mr. Polk's testimony there was no diversion of any men until they got into Alaska. Up until that time they were operating under our original contract.

The Court: No, my recollection of the testimony in the trial in the first instance was that this firm of Lytle & Green were sort of super-contractors, over at least five different contracting concerns, and the engineering had been done and the contracts had been awarded. This is the first time that I have

(Testimony of Clifford G. Polk.)

been advised that it's the contention of the plaintiff that all employees were chargeable to these two sections.

Mr. Peterson: Why, your Honor, that is what they were hired primarily for, and they all had contracts but they didn't have any contracts for any particular section—these so-called subcontractors, and they were [73] shipped to Alaska under this original contract. When they got to Alaska——

The Court: When you say original contract you mean——

Mr. Peterson: I mean the 155-mile proposition. When they got up to Alaska and arrived there at Gulkana, as I understand, after they arrived there, Mr. Polk, there, the representative of the PRA, assigned them to different places other than this 155-mile, but they went up there pursuant to the contract for the 155-mile section, and we relied unquestionably, until they arrived there and until they were assigned to Section 3 we will say, or Section 4, or some other section, and after the assignment of course, then under the decision when they went to work on something else, then of course they were outside the 155-mile limit, but the only contract in existence, as far as Lytle & Green was concerned, was the contract covering the 155 miles. These men were all employed——

The Court: Well, just a moment, let me ask the witness a question to clear this up. I want to avoid, if I can, the time necessary to read that entire transcript of the earlier trial.

(Testimony of Clifford G. Polk.)

What was the setup there in reference to the construction of these five sections of highway? [74]

The Witness: Well, I believe there were only four sections.

The Court: Or four sections, then.

The Witness: The contract provided for the initial construction of Sections A-1 and A-2, the 155 miles, and I believe there is a clause in that to the effect that the following year the government could request—could have the contractors go on to Sections A-3 and A-4. The original contract provided for the construction of A-1 and A-2.

The Court: Then your position is right, Mr. Peterson. Then your position is right. I have been laboring under the impression that there were four sections, and it has been mentioned here several times there were either four or five so-called subcontractors.

Mr. Peterson: No, your Honor, the subcontractors were all employed and sent up there with reference to Sections 1 and 2. That's my understanding of the matter. The matter I would like to clarify with Mr. Polk, if I may.

Cross-Examination

By Mr. Peterson:

Q. Mr. Polk, do I understand that after the contractors got up there, we will say the Western Construction Company, [75] after they arrived there then you assigned them to some other section, is that the way it was done?

A. Yes, that's it.

(Testimony of Clifford G. Polk.)

Q. Now, this computation, I understand that is being offered here this uncertified computation, covers the transportation or the travel time probably more correctly, of the employees going up there with respect to Sections 1 and 2, that's correct, is it not, under the primary contract?

A. Yes, I think that is true.

Q. And after they arrived there then they were diverted to these other sections, Richardson Highway and 3 and 4? A. Yes.

Q. That's the way it happened?

A. That's the way it happened.

Q. Now, in making the estimate of $35,000 for unloading, do I understand you excluded in making that figure, the unloading of the equipment of Weldon Brothers and Dusenberg for the reason that in the payroll which had been prepared here, you covered their entire time?

A. The payroll covers their entire time, yes.

Q. And as I understand, you excluded from this estimate what you considered as being the time their employees were engaged in unloading. [76]

A. Yes.

Q. Yes, and that was what amount?

A. Approximately five thousand dollars, for the two contractors.

Q. Yes, and I understand you did the same in connection with the maintenance feature of the road into—from Gulkana to Salana. A. Yes.

Q. You excluded them from the estimated computation on what they had earned on that because

(Testimony of Clifford G. Polk.)

it is included in the entire payroll, which is in evidence? A. Yes.

Q. Is it possible for you to make any division from the Dusenberg Weldon payrolls?

A. To make any what?

Q. Is it possible for you to make any distribution of the Dusenberg and Weldon payrolls as between the 155-mile Sections 1 and 2, and some other work that may have been done up there by them?

A. Oh, yes, that would be relatively simple because everything commencing August 1st was on A-1 and A-2, but that's the date established when they started and the payrolls start with August 1st. That is, we have a payroll of August 1st—starting with August 1st, the very day they entered on that work. Anything prior to that was other [77] work not on Section A-1 or A-2.

Q. But then, of course, there is included—there would then be in addition to that the travel time and the unloading. Do you know when the travel time and unloading of Dusenberg for instance, ceased?

A. Well, this document just submitted will show the travel time—the end of the travel time. I think it was July 14th.

Q. Well, let me get at it in another way. The $90,000 which Mr. Sager referred to, which is in the—included in the payroll that was referred to by the Circuit Court of Appeals, that was for actual time out on 1 and 2? A. Yes.

Q. Yes, and that did not include the travel time and the unloading? A. No, it did not.

(Testimony of Clifford G. Polk.)

Q. Yes, and it didn't include the maintenance?

A. No.

Mr. Peterson: We thought, your Honor, we might be able to dispose of this matter this afternoon. I seem to have been in accord with Mr. Sager as to what the Court intended us to do.

The Court: Well, I think in clarifying it as you have here, since the witness has been put back on the stand, insofar as the Court is concerned in removing [78] that misapprehension or misunderstanding——

Mr. Peterson: Yes.

The Court: ——I had with reference to the situation there, the matter is virtually to a point of disposition, excepting the matter of calculating the amount that would be due.

Mr. Sager: As I see it, your Honor, there is only one matter left undetermined, and that is due to my misunderstanding of your Honor's statement this morning as to what you had included. I think Mr. Polk can make as good an estimate of the work of Dusenberg and Weldon Brothers in unloading and travel and maintenance as he has with the other contractors, and then I have a similar computation as those admitted for those two contractors. I don't know whether Mr. Peterson has seen them, because we didn't consider them necessary under our interpretation of your Honor's holding this morning, but I have those in the office and can get them. It would put Weldon Brothers and Du-

(Testimony of Clifford G. Polk.)

senberg in exactly the same position as all the other contractors. When they were diverted then their time is no longer attributable to the contract, except, of course, for the month that they actually worked on A-1 and A-2, which is already established.

The Court: That is correct, if I understand [79] you.

Now the month of August—the full month of August, these various employees were all engaged on these—under the contract on this 155 miles of highway.

Mr. Sager: The two—of the two contractors.

The Court: The two contractors.

Mr. Sager: That is right, Dusenberg and Weldon Brothers.

The Court: Well, were there other contractors who had the same status as these two?

Mr. Sager: None of the other contractors ever went on Sections A-1 or A-2, your Honor, or at least during the coverage period, or prior thereto.

The Court: But during the month of July and a part of June, the employees that had been recruited for A-1 and A-2, were diverted to other contractors?

The Witness: To other sections, yes.

The Court: To other sections. Well, of course they could not be at that time, under the holding of the decision here of the Circuit Court could not be calculated as an item chargeable or an item for which the plaintiff would be entitled to recover,

(Testimony of Clifford G. Polk.)

except that part of the decision which indicates that those things which were essential incidents, and that's what caused [80] the difficulty in making a disposition of this case, because it is humanly impossible under conditions that prevailed at that time with a large number of men to say exactly what—who the individuals were and what the items amounted to, but certainly unloading all equipment that was to be used on this job was an essential incident. Certainly maintaining a highway sufficiently passable to transport the equipment to the place where it was to be used was essential, and then, since they were recruited during this period of time following June 17th and were being paid travel time, that was a part of the liability assumed by the insurance company when they wrote the contract, and that's what I'm trying to see if the parties can arrive at, so as to—and then I shall be able to make a finding.

Mr. Sager: I think by my offering these other two summaries of the travel time paid Dusenberg and Weldon Brothers, and Mr. Polk can estimate there what additional cost there would be on the unloading and transportation and maintenance because of the inclusion of those two contractors, it would fairly well give us the figures.

The Court: It should, but I can readily see the difficulty that would be encountered if you try to determine that exactly, and the burden of course would be on the plaintiff to establish that as a fact, because the plaintiff alleges this amount of insur-

(Testimony of Clifford G. Polk.)

ance premium due and under the holding of the Circuit Court I have no alternative but to charge the plaintiff with that, and the testimony of the witness offered on behalf of the defendant clearly indicates that there is some fair sized sum of money due there, but if I apply strict rules of proof, why it would be a case of denying relief where the Court felt that some relief was probably forthcoming.

Mr. Peterson: Well, now, do I understand that the ruling of the Court is that where men were recruited and proceeded to Gulkana; after arriving there they were diverted to some place other than the 155-mile section; that the plaintiff is entitled to the travel time and the time until such diversion took place?

The Court: Yes, insofar—as—the burden is upon you to establish some amount.

Mr. Peterson: Well, now, your Honor, this calculation which Mr. Sager presented, is I understand, a correct calculation of that travel time until a diversion was directed, because the diversions were all directed after they got into Alaska. Is that correct, Mr. Sager?

Mr. Sager: That is correct. [82]

The Court: The premium can be calculated on that figure then.

Mr. Peterson: Yes.

The Court: And the premium can be calculated upon the second figure as to the August payroll, which is conceded was on the job.

Mr. Peterson: Yes.

(Testimony of Clifford G. Polk.)

The Court: Now, then, we have left only the——

Mr. Peterson: The unloading and the maintenance. I think that we can establish that by Mr. Polk as well as it could be established, anyway, because obviously it is a matter of estimate.

The Court: It appears to the Court that it would have to be such.

Q. Mr. Polk, have you made a checkup and given a careful consideration to the matter of the time consumed and the remuneration earned with respect to unloading equipment at Valdez and moving it into the job? A. Yes, I have.

Q. Yes. Is it possible to determine that accurately? A. No, sir, it is not.

Q. And it can only be arrived at, can it, by an estimate, considering all of the factors?

A. Well, in my opinion it can be.

Q. Yes, and what in your opinion is a proper amount on [83] account of payroll to be allowed for the unloading of the equipment at Valdez and moving it in to Gulkana?

A. Well, the way I arrived at that was this way: I figured that it would take ten per cent of the contractor's crew a period of fifteen days.

Q. And that, considering the rate of pay, what did that amount to in dollars?

A. Roughly, it is around five thousand dollars for both contractors.

Q. But for the entire equipment, was how much? A. Beg your pardon?

(Testimony of Clifford G. Polk.)

Q. For the entire equipment of all contractors moving in? A. $40,000.

Q. $40,000, and then for the maintenance of the road in—from Gulkana to Salana, for necessities or supplies to be moved in what did you estimate that entire—how many men did you estimate was required in that maintenance job?

A. I estimated 35 men for the period July 7 to August 31.

Q. That is 54 days, I think? A. Yes.

Q. And your entire computation of that was?

A. $27,594.

Q. Then I understand you deducted $5,000 from that figure on account of employees of Weldon Brothers and [84] Dusenberg, for the reason that their entire personnel was embodied in the payroll which had been presented? A. That is right.

Q. That is right, so that a summary of your figures then is, making allowances for these deductions for Dusenberg, because their men and Weldon Brothers being included in the payroll which has been presented, your estimate is $35,000, with respect to the unloading? A. Yes, sir.

Q. And moving in, and $22,000—$22,594, with respect to the maintenance incident to Sections 1 and 2 of the so-called—of the road along Section 3?

A. Yes, that's right.

Q. Yes.

The Court: Well, I must confess that I am still confused, particularly on the $40,000 item. You

(Testimony of Clifford G. Polk.)

said $40,000 for all contractors. Now do you mean by that——

The Witness: I estimate $40,000 was the entire cost of unloading all equipment and transporting all equipment.

The Court: Well, was that equipment that was going to be used on Sections 1 and 2, if it hadn't been for the diversion? A. Yes, sir. [85]

The Court: Well, that clears it up. You refer to all contractors and you have these other two sections of the road that is confusing the Court. In this $5,000 item that you deducted from the forty thousand, is that because it is an included item in the payrolls?

The Witness: Yes, otherwise we would be allowing that payroll twice.

The Court: I see.

Mr. Peterson: And that is true with respect to the maintenance.

The Court: Well, the sum and substance of your testimony is, then, that the sum of $25,000 plus $22,594 would represent the amount that would be chargeable as against this insurance premium, or insurance policy.

The Witness: Yes, sir, except the Dusenberg and Weldon's share of unloading and maintaining has been excluded from those figures.

The Court: Well, that's the $5,000 that has been excluded in the two items?

The Witness: Yes.

The Court: Well, then, it would follow that the

(Testimony of Clifford G. Polk.)

judgment would be one based upon the amount of the travel time, plus the amount of the unloading and maintenance, plus the month's work during the month of August. [86]

Mr. Sager: That is my understanding now, your Honor, but I will have to supplement the record with the travel time of Dusenberg and Weldon Brothers. I don't think that is included in that summary.

Mr. Peterson: That—if we are going on estimates, that restores the $5,000 back into the unloading and the $5,000 back into the maintenance.

The Court: Well then wouldn't you be duplicating that item?

Mr. Sager: No, we came in here with the idea we were going to use the entire payroll of Weldon Brothers and Dusenberg. We both understood your Honor to indicate that this morning, whether they were diverted or not, so then we eliminated the Dusenberg and Weldon Brothers work in transportation and unloading and maintenance, because the entire payroll was already in. Now, however, if your Honor is holding that they are in the same position as other contractors when they were diverted, the time they spent on diverted work is not applicable to the policy, then we treat that the same as the others and we have to show their travel time, plus estimated unloading and transportation, and maintenance. We have got everything in here on that except the travel pay, plus one month's work on the two sections.

(Testimony of Clifford G. Polk.)

The Court: You say everything but the travel time?

Mr. Sager: Yes.

The Court: Well isn't this A-15 the travel time?

Mr. Sager: That doesn't include Dusenberg and Weldon Brothers. I have to check again to be sure.

The Court: You mean it doesn't include the individuals?

Mr. Sager: That is right.

Mr. Peterson: No, it doesn't include their forces.

Mr. Sager: It includes all the other contractors but Dusenberg and Weldon Brothers, and I have a similar computation as to those two contractors. I didn't bring them in because——

The Court: Well, weren't all these men recruited to work on sections 1 and 2?

Mr. Sager: They were all recruited under the same contract, yes. The situation is, your Honor, there was one so-called management contract with Lytle and Green. Then there were fourteen other contractors, is that correct?

Mr. Peterson: Yes, that is right.

The Witness: I believe it is thirteen.

Mr. Sager: Fourteen including Lytle & [88] Green. Anyhow, fourteen other so-called unit contractors. They all have a separate contract with the government, but they were under the direction of Lytle & Green, Lytle & Green being the general management contractors.

The Court: And what was the status of Weldon and Dusenberg?

(Testimony of Clifford G. Polk.)

Mr. Sager: They were some of these unit contractors, the same as all the other thirteen.

The Court: But the whole thirteen were to perform services on sections 1 and 2, and would have performed services if it had not been for the diversion?

Mr. Sager: That is right. At least the contract specifies it was to be on the 155 miles. There is this other element. Each of those contracts provided that they may be assigned to other work, at the discretion of the government, and that's what happened, of course, so that as I stated this morning, whether they were going to Sections A-1 or A-2, or were going to some of the other sections it seems to me is some question, but that is a matter for the Court to determine.

The Court: Well what I would like to have the witness clear up; what was the distinction between Weldon and Dusenberg and the other eleven contractors—subcontractors if you might call them that.

The Witness: There was no distinction at all. They were up there for the same purpose, and Dusenberg has a grading outfit—moves dirt.

The Court: Well, is this the distinction, though, as far as this case is concerned, that it was the Weldon and Dusenberg employees who worked during the month of August on this job?

The Witness: Yes, sir.

The Court: And the other eleven subcontractors did not have their employees on this job?

(Testimony of Clifford G. Polk.)

The Witness: Not on Section A-1 or Section A-2.

Mr. Sager: That is the only reason they are singled out over the others, because they happened to be the two that worked on A-1 and 2.

The Court: But originally the plan was to have them all work on A-1 and A-2?

The Witness: Yes, sir.

Mr. Peterson: Well, now, as I understand this, we have disposed of the travel time of the contractors—of the employees of the contractors other than Dusenberg and Weldon Brothers. That is in evidence, and there is to be supplied, then, the travel time of the employees of Dusenberg and Weldon Brothers, that's correct.

Then there is to be taken into consideration the matter of the unloading of equipment of Dusenberg [90] and Weldon Brothers. That's correct.

Mr. Sager: That is right.

Mr. Peterson: Then there is to be taken into consideration the maintenance feature—those three items.

Now, as I understand then, that—and there is also included the $90,000 from the 1st of August until the 31st of August, and then there is the short period where they were diverted after arrival to Alaska until August 1st, which must be stricken from these payrolls, under the Court's ruling.

The Court: Yes.

Mr. Sager: That will be determined by adding the ninety thousand plus the estimate of that main-

(Testimony of Clifford G. Polk.)

tenance, transportation and unloading, plus the travel time.

The Court: That is correct, I think.

Mr. Peterson: Yes. If there was some work performed—diverted to some other place up there in the short time between their assembling an outfit there and going on 1 and 2, that will be deleted from the payroll that has been submitted, Exhibit 11 I believe, or 12—it doesn't make any difference.

The Court: Yes. It can be determined with a sufficient degree of certainty.

Mr. Sager: We will have Dusenberg and Weldon [91] Brothers in exactly the same position as the other contractors. We will show their travel time, and we have already got the $90,000 figure, which represents the month of August payroll on A-1 and A-2.

Mr. Peterson: Yes.

Mr. Sager: And then he has estimated there additional time for transportation and maintenance.

Mr. Peterson: Well, then we agree that his estimate of $5,000—$5,000 with respect to the unloading and the other, that is, restore the unloading to $40,000 instead of thirty-five, and the maintenance over there to twenty-seven five ninety-four, and that takes care of the two five thousand dollar deductions we made.

Mr. Sager: That's right. These figures then would represent forty thousand, twenty-seven thousand——

Mr. Peterson: Five ninety-four.

Mr. Sager: Would represent it.

(Testimony of Clifford G. Polk.)

The Court: Well, I think we have made some progress, at any rate. It's a very complex situation.

Mr. Peterson: Well, we can probably——

Mr. Sager: May we offer these other documents?

The Court: It might be stipulated that these other documents may be offered in evidence and made a part of the record in this case. [92]

Mr. Sager: The travel time concerning these two contracts.

Mr. Peterson: Yes.

The Court: Very well, and then that is all.

(Whereupon, adjournment was taken at 5:03 o'clock p.m.) [93]

February 3, 1947, 10:00 o'clock a.m.

The Court met pursuant to adjournment; all parties present.

The Court: Docket 556, Hansen & Rowland, Inc., versus C. F. Lytle Company, presentation of findings of fact and conclusions of law.

I understand, gentlemen, the only issue left here is that of interest on the amount.

Mr. Peterson: Your Honor, there was just one matter, I just enquired of Mr. Sager about. Subsequent to the decision of the Circuit Court of Appeals we requested the defendant to provide the payroll broken down. Those were supplied and they are in the possession of Mr. Sager—certified payrolls, and I examined the record here and I think they are not in evidence, your Honor, and I think they should be. I don't know what attitude the

government may take after this findings and judgment are rendered as to another appeal to the Circuit Court of Appeals, but I think those should be a part of the record, your Honor.

The Court: Have any objection, Mr. Sager?

Mr. Sager: Well, I don't know that I have any [94] objection. They are a voluminous lot of documents. We had them here at the original hearing, and I offered them at that time, and Mr. Peterson objected because they would encumber the record, and then we agreed at that time as to the total payroll——

Mr. Peterson: No, I——

Mr. Sager: I mean we agreed that the amount they alleged was one million fifty-five thousand dollars, or whatever it was, was the actual amount shown by those payrolls, so they were not put in evidence. Now I still have them in my file. I don't think that they enter into this issue at the present time.

Mr. Peterson: They may become important in case of an appeal.

Mr. Sager: Well, I anticipate that they may want to urge this provision that they suggest in their brief they are entitled to one-half of something if the payrolls were not properly submitted. If that is true, why then I would resist putting them in because that has no——

The Court: These proposed findings and judgment apparently don't raise that issue, at all.

Mr. Sager: I don't see how they do.

Mr. Peterson: No, we don't raise the issue and

I'll state frankly to the Court that we have no idea of an [95] appeal, but I was somewhat concerned, looking at Mr. Sager's memorandum on this matter of interest, he directed attention to the fact that the figures supplied by Mr. Polk were estimates only, and I am somewhat apprehensive of what may happen in the Circuit Court of Appeals if the government should appeal this case on that feature of the matter.

Mr. Sager: Well, if your Honor——

The Court: Well, if they were identified—I don't know whether they were—they they aren't they maybe given an appropriate marking and made a part of the record.

Mr. Peterson: May they be made a part of exhibit 15, your Honor? That's the last exhibit.

The Court: Yes. Of course if there is some original document that has to be used elsewhere again by the Bureau of Public Roads——

Mr. Sager: Oh, there is no difficulty of that nature. I have certified copies of the payrolls of each contractor.

The Court: Very well.

(Whereupon payrolls referred to were received in evidence and marked exhibit 16.)

The Court: Now you may proceed, Mr. Peterson.

Mr. Peterson: So far as we are concerned, at least, these findings were discused more or less with Mr. Sager, and finally agreed upon, as I understand, in accordance with a letter which he ad-

dressed to me, and I understand [96] the only question is that of interest.

It's plaintiff's contention that the amount of premiums became due on the cancellation of the policy, September 2, 1942. The matter of determining the amount of premium is only a matter of computation, and this case was tried in 1944. The Court at that time made findings and entered a judgment awarding interest from September 2, 1942, and of course the formula on which the premium was computed was—the Circuit Court of Appeals held was erroneous; that only a part of the items would be used as a basis for premium computation and allowed a partial recovery, but as to two items, Dusenberg and—two contractors, anyway the judgment was affirmed as to those and the matter remanded here to compute the amount due in accordance with their formula. I don't know the formula laid down by the Circuit Court of Appeals, but it became the basis. In any event the money was all due, whatever we were entitled to recover, on September 2nd.

The contract by its terms provided that premiums would be paid every two weeks.

Now there are two reasons we think why the plaintiff is entitled to interest on the amounts which the Court will determine to be due, which is September 2, 1942. First, the decision of this Court and the affirmance of the judgment of this Court by the Circuit Court of Appeals, sustaining [97] the right to interest from September 2, 1942, on the ninety-two thousand dollar item, which your Honor

will remember the Circuit Court of Appeals held was proper to compute premium on, is stare decisis of the question. I assumed your Honor has had an opportunity to read our memorandum brief on the matter?

The Court: I have read it carefully, Mr. Peterson and likewise the briefs submitted by the defendant here.

Mr. Peterson: In view of your Honor's statement, I won't pursue the matter further. I think clearly that we are entitled to interest because the decision of the Court settles that question, and because, without regard to the decision of the Court, the amount of the premium can be determined by computation.

The Court: Well, that is a matter that is troubling me. I am conscious of the fact that I allowed interest before, but I question very much whether the Circuit Court passed upon that as an issue, at all. The first paragraph is a mere recital of the judgment from which the appeal is taken, but no consideration given to the issue of interest. The first case was tried upon—or at least at the beginning of the trial, upon the theory that it was an account stated, and of course if it were an account stated, interest would be [98] allowed. However, after the issues were made and we commenced taking testimony we tried the case upon the theory as to what was actually due, rather than it being an account stated.

Now, then, it came back here for trial with specific directions to take testimony as to what amount

was due, and that being true the general rule is that interest can not be allowed upon a claim where evidence must be taken to ascertain the amount of it, because it is a non-liquidated claim.

Mr. Peterson: Oh, I think your Honor fails to mark the distinction in the cases. It appears to me the logical and common sense of the proposition is stated in the case of Sullivan against Millan in the 19th Southern, cited in my brief (reading citation).

(Thereupon argument continued.)

The Court: I think I shall have to deny interest and allow you an exception, and I think that if you want to take that question on to the Circuit Court you might stipulate facts and not take this whole record up again.

Mr. Peterson: Take it up on a short statement of facts.

The Court: And otherwise if you are in accord I will sign the judgment and findings as submitted.

Mr. Sager: The amount in the judgment we do not object to.

The Court: I will have to strike therefrom the interest unless you want, Mr. Peterson, to prepare another judgment and findings, why I will give you an opportunity to do that. Of course there are no exceptions saved in this one.

Mr. Peterson: I think probably we can—have you the findings before you, your Honor?

The Court: Yes, and the judgment, also.

Mr. Peterson: If you will turn to the findings, may I suggest that you delete "with interest there-

on at the rate of six per cent per annum from September 1st, 194——"

The Court: Where are you reading from?

Mr. Peterson: The last page of the findings.

Mr. Sager: Of the conclusions?

Mr. Peterson: Or of the conclusions, yes, I beg your pardon.

The Court: I didn't intend to have these original documents filed, but they are marked "filed" now. I just meant to have them placed in the file. They are labeled additional findings of fact and conclusions?

Mr. Peterson: Yes.—No,

The Court: Well those are the findings you refer [100] to in the conclusions?

Mr. Peterson: Yes, Your Honor, the conclusions, forty-nine hundred and four ten due.

The Court: I think I better take these out and pass them back to you.

Mr. Peterson: Yes, and then shall I rewrite it, Your Honor? The last page?

The Court: I think perhaps you should and then you can save such exceptions as you wish.

Mr. Peterson: If I may have the originals. It is understood now that I will rewrite the last page of the judgment, deleting——

The Court: And you may save your exceptions and a place for the defendant to except, likewise.

Mr. Sager: I think the defendant should except because of the question of appeal being determined by the department, the department would like to save exceptions to the findings.

The Court: Then you may, after you have agreed upon them, just submit them and I will sign them at any time. You need not make an appearance.

(Whereupon, adjournment.)

CERTIFICATE

I, Russell N. Anderson, official court reporter for the above-entitled court, do hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ RUSSELL N. ANDERSON,
Official Court Reporter.

[Endorsed]: Filed April 24, 1947.

[Endorsed]: No. 11639. United States Circuit Court of Appeals for the Ninth Circuit. Hansen & Rowland, Inc., a corporation, Appellant, vs. C. F. Lytle Company, Inc., a corporation, and Green Construction Company, a corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed May 28, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 11639

C. F. LYTLE COMPANY, INC., a corporation, and GREEN CONSTRUCTION COMPANY, a corporation,

Appellants,

vs.

HANSEN & ROWLAND, INC., a corporation,

Appellee.

STIPULATION AS TO RECORD

Whereas, the United States Circuit Court of Appeals for the Ninth Circuit rendered its decision in the above entitled cause on October 31, 1945, by which decision the judgment of the lower court was in some respects reversed and the cause remanded to the District Court of the United States for the Western District of Washington, Southern Division, for further proceedings, and

Whereas, a further hearing in said cause was had pursuant to the said opinion and mandate of the United States Circuit Court of Appeals for the Ninth Circuit, and at the conclusion thereof a final judgment was rendered by said District Court of the United States for the Western District of Washington, Southern Division, on February 4, 1947, and Hansen & Rowland, Inc., a corporation,

Appellee, in the above entitled cause, feeling aggrieved at the decision and final judgment of the said District Court of the United States for the Western District of Washington, Southern Division, rendered on the 4th day of February, 1947, has served and filed a Notice of Appeal from said final judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and to the end that said Appeal may be presented and fully considered by the United States Circuit Court of Appeals for the Ninth Circuit, the parties hereto hereby stipulate and agree that the matters and proceedings set forth in the printed Transcript of Record herein, together with certain of the Exhibits referred to therein, are material to a consideration of said Second appeal from said final judgment of said District Court of February 4, 1947, and to the end said printed Transcript of Record heretofore filed in this cause may be made a part of the record on said appeal, the parties hereto stipulate and agree that said Transcript of Record, including the Exhibits, made a part thereof and referred to therein, together with a copy of the further proceedings had before the said District Court, resulting in said judgment of February 4, 1947, together with Exhibits introduced therein, may, subject to the approval of this Court, be made a part of the record herein, it is further stipulated and agreed that the making of this stipulation does not foreclose either party hereto from designating portions and parts of the record of the further proceedings

herein resulting in the final judgment of February 4, 1947.

Dated this 24th day of April, 1947.

/s/ JAMES L. CONLEY,
PETERSON & DUNCAN,
Attorneys for Appellant.

/s/ J. CHARLES DENNIS,
/s/ HARRY SAGER,
Attorneys for Appellee.

[Title of Circuit Court of Appeals and Cause.]

ORDER

It appearing to the court from the written stipulation of the attorneys of records for the parties hereto, that pursuant to the opinion and mandate of this court rendered on the 31st day of October, 1945, a further hearing of this cause was had before the District Court of the United States for the Western District of Washington, Southern Division, and that said court rendered a final judgment pursuant to said further hearing on February 4, 1947, and that Hansen & Rowland Inc., a corporation, Appellees, above named, has appealed from said final judgment to this court, and the parties hereto having agreed that the printed Transcript of Record in this cause, together with the Exhibits set forth and referred to therein, and all proceedings incident thereto are material and proper to be considered on said appeal of Hansen & Rowland, Inc., a corporation, from the final judgment of the District

Court of the United States for the Western District of Washington, Southern Division, entered herein on February 4, 1947, the court doth now order that said printed record, together with exhibits described and referred to therein may be made a part of the record on said Second Appeal.

Dated April 25, 1947.

/s/ WILLIAM DENMAN,
United States Circuit Judge.

Presented in behalf of Peterson & Duncan, Attorneys for Hansen & Rowland, Inc.

/s/ WENDELL W. DUNCAN,

Approved:

/s/ HARRY SAGER,
Of Counsel for Appellants.

[Endorsed]: Filed April 25, 1947.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT (PLAINTIFF) INTENDS TO RELY ON APPEAL.

(Second Appeal)

Appellant (Plaintiff), intends to, and will, rely on the following points to effect a reversal of the judgment entered in above cause by the trial court on February 4, 1947, to wit:

1. The Trial Court committed reversible error

in ruling that the burden was on Plaintiff to establish the amount of remuneration paid employees by defendants, on which premiums were to be computed, the effect of which ruling impaired the contract between the parties which provides:

> "The named insured shall maintain for each hazard records of the information necessary for premium computation on the basis stated in the declarations, and shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct."
>
> * * * * * * *
>
> "The deposit premium stated in the policy to which this endorsement is attached is not based upon the estimated remuneration for the policy period but is the sum hereby agreed to be paid in cash on delivery of the policy.
>
> "It is hereby understood and agreed that this policy is issued upon a Monthly pay-roll basis and that immediately after the expiration of each period of One month from date of policy the Assured shall render a written statement to the Company of the full amount of remuneration paid employees during such period and shall immediately pay the premium thereon based upon the rates stated in the policy. The deposit premium paid on delivery of the policy shall apply on the final payment of premium.
>
> Nothing herein contained shall be held to vary, waive, alter or extend any of the terms,

conditions, agreements or declarations of the undermentioned policy, other than as above stated."

Original Trans. Record pp 73, 74 and 77.

2. Upon Defendants showing that they had not maintained for each hazard, records of the information necessary for premium computation, and that it was impossible for them to state or compute the remuneration paid to employees of unit contractors with respect to certain work subject to premium charge, the Trial Court was bound to have computed the earned premium by using as remuneration 50% of the unit contract cost of each sub contractor as shown by the payrolls, Exhibit 16, as required by the provisions of the insurance contract, to-wit:

"If, in the case of any other contractor or sub-contractor covered as an additional named insured under said Policy, the remuneration of such contractor's or sub-contractor's employees is not available to the Company, the earned premium as respects such contractor or sub-contractor shall be computed by using as remuneration 50% of the entire contract or sub-contract cost paid to such contractor or sub-contractor."

3. Notwithstanding the legal basis for the computations of premium may have been the subject of controversy between the parties, the amounts to which appellant is entitled came due under the contract on September 1, 1942, and was capable of

exact determination by computation and bears interest from that date.

4. Appellant (Plaintiff) is entitled to interest at the legal rate from September 1st, 1942, on any recovery allowed, in accordance with the original judgment entered herein on September 22, 1944 (original Trans. p. 31), which is res adjudicata on the question of interest. (That part of the judgment not being reversed by this Court.)

/s/ JAMES L. CONLEY,
/s/ CHARLES T. PETERSON,
PETERSON & DUNCAN,
Attorneys for Appellant.

Received copy of the foregoing Statement of Points on which Appellant (Plaintiff) Intends to Rely on Appeal, this 23rd day of April, 1947.

/s/ HARRY SAGER,
Attorneys for Defendants.

[Endorsed]: Filed May 28, 1947.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PARTS OF RECORD TO BE PRINTED

(Second Appeal)

Come now Plaintiff appellants, and herewith designate to be printed the following portions and parts of the record on appeal, which they think necessary for the consideration thereof:

1. Additional Findings of Fact and Conclusions of Law filed herein on February 4, 1947.
2. Judgment filed herein on February 4, 1947.
3. Notice of Appeal.
4. Bond on Appeal.
5. Transcript of Testimony.
6. Stipulation of Parties Regarding Original Record.
7. Order of Circuit of Appeals re Original Record.
8. Statement of Points on which Appellant intends to rely on Appeal.
9. Order for Clerk to Transmit Original Exhibits to Circuit of Appeals.
10. Designation of Parts of Record to be printed (Appellants).

Dated this 28th day of April, 1947.

PETERSON & DUNCAN,
/s/ JAMES L. CONLEY,
Attorneys for Plaintiff
Appellant.

Copy of the foregoing Appellant's Designation of Parts of Record to Be Printed, received this 28th day of April, 1947.

/s/ J. CHARLES DENNIS,
/s/ HARRY SAGER,
Attorneys for Appellee.

[Endorsed]: Filed May 28, 1947.